

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





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B P/S

# 74-1537

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1537

RENEE SLADE,

*Plaintiff, Appellee,*

*against*

SHEARSON, HAMMILL & CO. INC.,

*Defendant, Third-Party*

*Plaintiff, Appellant,*

*against*

NATIONAL BANK OF NORTH AMERICA,

*Third-Party Defendant.*

EDWARD E. ODETTE,

*Plaintiff, Appellee,*

*against*

SHEARSON, HAMMILL & CO. INC.,

*Defendant, Third-Party,*

*Plaintiff, Appellant,*

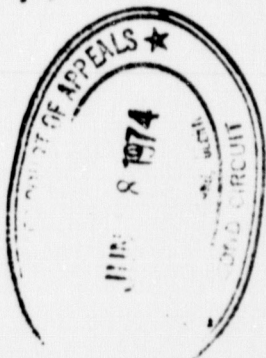
*against*

NATIONAL BANK OF NORTH AMERICA,

*Third-Party Defendant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

### JOINT APPENDIX



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## JOINT APPENDIX TO BRIEFS

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# **Docket Entries in Slade v. Shearson, Hammill & Co. Inc.**

<u>Date</u>	<u>Proceedings</u>
Nov. 10-72	Filed complaint and issued summons.
Nov. 28-72	Filed notice of motion to make case class action. Ret. 12-15-72 (by plttf.).
Nov. 28-72	Filed plttfs. memorandum of law in support of class action motion.
Dec. 4-72	Filed summons and return. Served Shearson Hammill & Co. on 11-21-72.
Dec. 7-72	Filed defts. notice of motion to consolidate this action with 72 Civ 4930. Ret. on 12-15-72. (Also in 72 Civ 4930).
Dec. 12-72	Filed defts. notice of taking deposition.
Dec. 12-72	Filed defts. preliminary interrogatories.
Dec. 12-72	Filed answer.
Dec. 13-72	Filed affidavit of Mordecai Rosenfeld in support of motion to consolidate. (Also in 72 Civ 4930).
Jan. 17-73	Filed memo endorsed on motion to consolidate. Motion granted. So ordered. Carter, J. (Also in 72 Civ 4930).
Jan. 26-73	Filed plttfs. notice of appeal.
Feb. 5-73	Filed defts. revised preliminary interrogs.
Feb. 5-73	Filed answer to amended complaint.
Feb. 7-73	Filed answers of plttf. Odette to interrogs.
Feb. 8-73	Filed stipulation & order that plttf. may serve and amended complaint, etc. & the preliminary interrogs. of deft. are withdrawn, etc. Carter, J.
Feb. 9-73	Filed plttfs. amended complaint.
Feb. 21-73	Filed plttfs. answers to defts. interrogs.
Feb. 26-73	Filed opinion #39241. The motion for preliminary injunction is denied. Carter, J.



*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Feb. 26-73	Filed application for temporary restraining order & order to show cause of plttf. intervenor.
Feb. 26-73	Filed memo endorsed on application for temp. restraining order filed this date: Motion denied. Carter, J.
Feb. 26-73	Filed memorandum of law in support of application for restraining order.
Mar. 6-73	Filed Karl Langer's notice of motion, re: leave to intervene, ret. before Carter, J. 3/16/73.
Mar. 6-73	Filed plttfs. notice of appeal from the order filed 2/26/73 denying plttfs. motion for preliminary injunction.
Mar. 14-73	Filed defts. memo in opposition to the application of Karel Langer for permission to intervene.
Mar. 20-73	Filed plttf. Odette's reply memo on behalf of Karel Langer's motion to intervene.
Apr. 6-73	Filed deposition of plttf. on 3/2/73, 10:15 A.M.
Dec. 22-72	Filed plttf. Odette's memorandum of law in opposition to motion to consolidate.
Apr. 19-73	Filed memorandum of plttf. Slade in reply to the memorandum served by plttf. Odette.
Apr. 19-73	Filed plttfs. request for additional relief in decree of prelim. injunction.
Apr. 20-73	Filed memorandum in opposition to motion for prelim. injunction.
Apr. 20-73	Filed plttfs. memo of law in support of motion.

*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Apr. 20-73	Filed affdvt. of Russel H. Beatie in opposition to motion.
Apr. 20-73	Filed affdvt. of Beatie in support of motion to consolidate.
Apr. 20-73	Filed affdvt. of Sidney Bogardus in opposition to motion.
Apr. 20-73	Filed plttf. Odette's revised proposed findings re motion.
Apr. 20-73	Filed affdvt. of Alan Stotsenberg in support of motion.
Apr. 20-73	Filed plttfs. supplemental memo of law in support of motion.
Apr. 20-73	Filed supplemental affdvt. of Alan Stotsenburg.
Apr. 20-73	Filed Notice to Docket Clerk that record on appeal has been trans. & certif. to USCA, 4/20/73.
May 2-73	Filed plttf's. motion for additional classes ret: 5-4-73.
May 2-73	Filed plttf's. memo of law in support of motion for additional classes.
May 10-73	Filed stip. & order extending return date of plttfs'. motion for designation of these law-suits as class action is adjourned from 4/27/73 to 5/25/73. Carter, J.
May 24-73	Filed notice of cross motion re: strike class action allegations (also for 72 Civ 4930).
May 24-73	Filed memorandum in support of defts. cross-motion for partial summary judgment—time and place to be determined (also for 72 Civ 4930).



*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
July 25-73	Filed certification of R. Alan Stotsenburg counsel for plttf. Odette re: consolidated cases.
Aug. 20-73	Filed transcript and hearing dated May 30, 1973.
Sep. 25-73	Filed notice of deposition of R. Paul Evans, on 10/25/73.
Nov. 20-73	Filed notice of deposition of William Preen on 11/27/73.
Dec. 14-73	Filed by plttf. Odette memorandum in support of motion for an order under Rule 37.
Dec. 14-73	Filed affdvt. and notice of motion by plttf. Odette to compel under Rule 37—ret. Dec. 21-73.
May 30-73	Pre-trial conference held by Carter, J.
Dec. 17-73	Filed order bringing in National Bank of North America as a third party. The Clerk of the Court shall issue a summons order the seal of this Court and shall cause the said summons and 3rd pty. complaint to be served upon the said 3rd pty. deft. Carter, J.
Dec. 26-73	Filed defendant's affdvt. and notice of cross-motion for an order awarding deft. Shearson, Hammill & Co. its costs and expenses.
Dec. 26-73	Filed defendants memorandum of law in support of cross-motion to award costs.
Dec. 27-73	Filed affdvt. of service re: 3rd pty. complaint—served: Mordecai Rosenfeld, 233 B'way NYC Pomerantz Levey Haudek & Block, 295 Mad. Ave., NYC R. Alan Stotsenburg, 260 Riverside Dr., NYC



*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Dec. 28-73	Filed 3rd pty. complaint.
Jan. 3-74	Filed by plttf. Slade—affdvt. and notice of motion to declare consolidated actions class action—ret. 4-27-73.
Jan. 3-74	Filed plttf's memorandum of law in opposition to defts. motion for summary judgment.
Jan. 4-74	Filed plttf's. general counsel's memorandum of law in support of motion for class action.
Jan. 4-74	Filed affdvt. of Abraham L. Pomerantz (plttf.) in support of motion for class action.
Jan. 4-74	Filed affdvt. of R. Alan Stotsenburg in opposition to 3rd pty. complaint.
Jan. 2-74	Filed memorandum opinion #40162 . . . for reasons indicated, the motion for partial summary judgment must therefore, be denied; plaintiffs' motion to proceed on behalf of all persons who purchased the stock of Tidal Marine in the period Oct. 1-71 to 8-2-72, as a result of solicitations by deft. Shearson, is granted, and defendant's motion to strike is denied. Re subclasses: Nothing in the cross-motion, herein denied in all respects, suggests that my directive of May 30 should be altered. Messrs. Rosenfeld and Pomerantz are to continue as general counsel for the class set forth in their motion. The motion by Karel Langer in intervene is denied. So ordered. Carter, J.
Jan. 8-74	Filed summons and Marshals return (re: 3rd pty. complaint)—served National Bank of North America by F. Pellicane on 1-2-74 (for consolidated cases 72 Civ 4779 and 72 Civ 4930).

*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Jan. 14-74	Filed plaintiffs request for documents pursuant to Rule 34.
Jan. 14-74	Filed plaintiffs interrogs. to deft. Shearson, Hammill & Co., Inc.
Jan. 11-74	Filed true copy of USCA order that the orders of the District Court are affirmed with costs to be taxed against the appellant (Odette)—Judgment entered—Clerk (no bill of costs or statement attached).
Jan. 16-74	Filed stip. and order that the time of any party to move for reconsideration of, certification of an appeal from or other similar relief relating to the order of this Court entered on Jan. 2, 1974 is ext. to Jan. 21, 1974. So ordered, Carter, J.
Jan. 22-74	Filed affdvt. and notice of motion by deft. and 3rd pty. pltf. for amendment of order to allow certification of appeal pursuant to 28:1292(b)—ret. 1-2-74.
Jan. 22-74	Filed deft. and 3rd pty. pltf's. memorandum of law in support of above motion.
Jan. 22-74	Filed by 3rd pty. deft. affdvt. and notice of motion for an order dismissing the 3rd pty. complaints in 72 Civ 4779—72 Civ 4930 and 73 Civ 1461—ret. Feb. 1-74.
Jan. 22-74	Filed 3rd pty. defts. memorandum of law in support of motion to dismiss 3rd pty. complaints.
Jan. 31-74	Filed deft. and 3rd pty. pltf's. reply memorandum in support of deft. and 3rd pty. pltf's. motion for amendment of order to allow certification of appeal (also for 73 Civ 4930).

*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Jan. 31-74	Filed notice of appeal to the U.S.C.A. from order granting plttfs'. motions to have actions declared class actions and denying deft. and 3rd pty. plttf's. cross motion to strike plttfs'. class action allegations.
Feb. 6-74	Filed stipulation and order that discovery of 3rd pty. deft. is adj. until the court renders its decision on NBNA's motion of 1-22-74 to dismiss 3rd pty. complaint, etc.—Carter, J.
Feb. 14-74	Filed deft. & 3rd pty. pltf's. objections to interrogs. by pltf. Slade.
Feb. 26-74	Filed stip. and order that discovery of 3rd pty. deft. is adj. until the Court renders its decision on NBNA's motion to dismiss 3rd pty. complaint; if NBNA's motion is not granted, NBNA will respond to interrogs., etc.; motion to dismiss is adj. to 3-8-74—Carter, J.
Mar. 8-74	Filed deft. & 3rd pty. pltf's. affdvt. of Russel H. Beatie, Jr. in opposition to 3rd pty. deft. NBNA's motion to dismiss 3rd pty. complaint.
Mar. 8-74	Filed deft. & 3rd pty. pltf's. memorandum in opposition to NBNA's motion to dismiss 3rd pty. complaint.
Mar. 8-74	Filed notice that the record on appeal (for consolidated actions 72 Civ 4779 and 72 Civ 4930) has been certified and transmitted to the USCA on 3-8-74.
June 26-73	Filed deft's. reply memorandum.

*Docket Entries in Slade v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Mar. 18-74	Filed opinion #40465 . . . on January 2, 1974, this court entered an order in form of a memorandum-opinion in which the motion of deft., Shearson, Hammill & Co. for partial summary judgment was denied. Deft. Shearson now seeks to have the question of law raised in that motion certified for appeal and urges that the statutory criteria for certification have been met.—For reasons indicated, the motion is granted. So ordered.—Carter, J.
Mar. 26-74	Filed stip. and order that the motion of National Bank of North America to dismiss the 3rd pty. complaints is adj. to 3-29-74—Carter, J.
Mar. 28-74	Filed reply memorandum of National Bank of North America re motion to dismiss.
Apr. 22-74	Filed rebuttal memorandum by deft. Shearson in opposition to 3rd pty. deft's. motion to dismiss.
Apr. 29-74	Filed second reply memorandum of National Bank of North America.
Apr. 29-74	Filed undertaking for costs of appeal—\$250.00—Nat'l Surety Co.
May 22-74	Filed notice that the suppl. record on appeal has been certified and transmitted to the USCA on 5-22-74.



**Docket Entries in Odette v. Shearson, Hammill & Co. Inc.**

(Consolidated with Slade v. Shearson,  
Hammill & Co. Inc.)

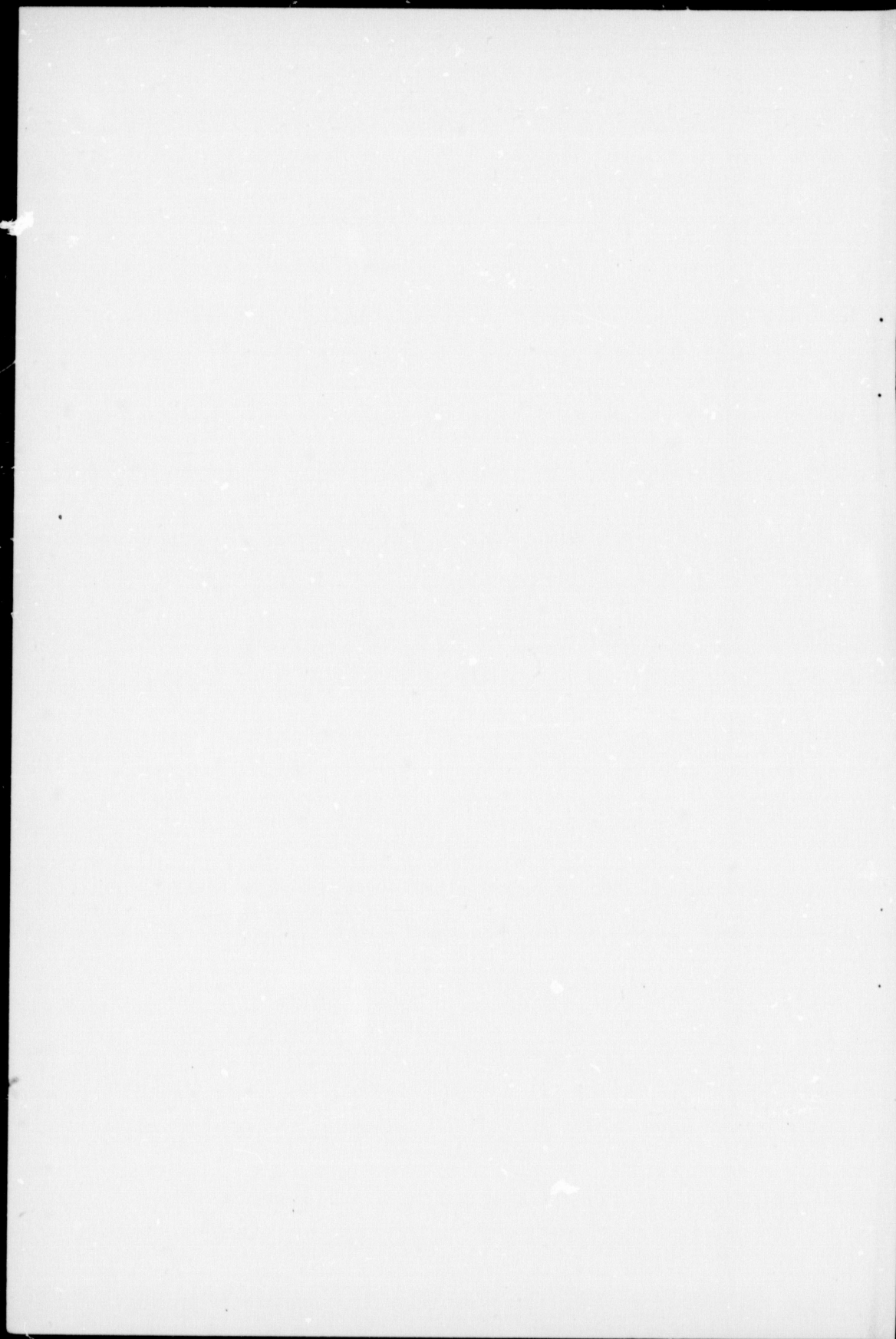
<u>Date</u>	<u>Proceedings</u>
Nov. 20-72	Filed complaint and issued summons.
Dec. 7-72	Filed defts. notice of motion re order pursuant to rule 42(a) FRCP to consolidate. Ret. 12-15-72 before Judge Carter. (Filed in 72 Civ 4779).
Dec. 4-72	Filed summons with Marshal's ret. Served Shearson Hammill & Co. Inc. by Mr. Hoblin on 11-21-72.
Dec. 13-72	Filed order to show cause for preliminary injunction ret. 12-15-72 at 9:30 am.
Dec. 13-72	Filed amended complaint.
Dec. 13-72	Filed affdvt. of Mordecai Rosenfeld in support of motion to consolidate (filed in 72 Civ. 4779).
Dec. 19-72	Filed notice of deposition of Edward E. Odette.
Dec. 19-72	Filed deft's. preliminary interrogatories.
Dec. 21-72	Filed plttf's. request for immediate determination of motion for preliminary injunction.
Dec. 21-72	Filed plttfs. notice of appeal.
Dec. 22-72	Filed notice of motion re: dismiss appeal ret. 1-5-73.
Dec. 22-72	Filed affdvt. of qualifications as counsel in a class action by R. Alan Stotsenburg.
Dec. 22-72	Filed plttfs. memorandum of law in opposition to motion for consolidation.

*Docket Entries in Odette v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
Dec. 22-72	Filed plttfs. Odette's memorandum of law in opposition to motion for consolidation.
Dec. 27-72	Filed memo endorsed on plttfs. request for immediate determination of motion for preliminary injunction dated 12-21-72—plttf. request is denied—Carter, J.
Dec. 26-72	Filed deft's. answer.
Jan. 8-73	Filed memo endorsed on plttf's. motion dated 12-22-72—motion granted—Carter, J.
Jan. 17-73	Filed memo endorsed on motion dated 12-13-72—the motion for a preliminary injunction is denied without prejudice to plttfs. right to reassert his request for preliminary relief at a time when resumption of trading becomes imminent. So ordered—Carter, J.
Jan. 17-73	Filed memo endorsed on deft's. notice of motion dated 12-7-72—motion to consolidate is granted, etc., so ordered—Carter, J. (Filed in 72 Civ. 4779).
Apr. 20-73	Filed notice to Docket Clerk that record on appeal has been certif. & trans. to USCA, 4/20/73.
May 14-73	Filed transcript of proceedings dated 2/6/73, 10:10 A.M.
May 24-73	Filed notice of cross-motion re: strike class action allegations (time and place to be determined).
May 24-73	Filed memorandum in support of deft's. cross-motion for partial summary judgt., etc.

*Docket Entries in Odette v. Shearson, Hammill & Co. Inc.*

<u>Date</u>	<u>Proceedings</u>
May 17-73	Filed true copy of mandate of the U.S.C.A. Ordered that the motion to dismiss with prejudice, the appeal from the order of consolidation of the U.S.D.C. S.D.N.Y. for lack of prosecution and for lack of jurisdiction, is granted. Fusaro, J.
May 30-73	Pre-trial conference held by Carter, J.
Dec. 17-73	Filed affdvt. of service re: 3rd pty. complaint (see 72 Civ 4779).
Dec. 28-73	Filed 3rd pty. complaint.
Jan. 3-74	Filed affdvt. of service re: notice of cross-motion and memorandum of law upon R. Alan Stotsenburg, atty. for pltff.
Jan. 31-74	Filed notice of appeal to the U.S.C.A. granting pltffs. motion to have actions declared class actions and denying deft. and 3rd pty. pltff's. cross motion to strike pltffs'. class action allegations.
Mar. 8-74	Filed notice that record on appeal has been certified and transmitted to USCA.





**Amended Complaint in Slade v. Shearson,  
Hammill & Co. Inc.**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

<p>RENEE SLADE, <i>Plaintiff,</i></p> <p><i>against</i></p> <p>SHEARSON, HAMMILL &amp; Co., INC., <i>Defendant.</i></p>	<p>72 Civ. 4779 (RLC)</p> <p>AMENDED COMPLAINT</p> <p>PLAINTIFF DEMANDS TRIAL BY JURY</p> <p>CLASS ACTION</p>
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Plaintiff, by her attorney, Mordecai Rosenfeld, as and for her amended complaint, alleges upon information and belief, except ¶¶ 2(c) and 4, which are alleged upon knowledge:

1. (a) The jurisdiction of this Court is based upon § 27 of the Securities Exchange Act of 1934 and the principles of pendent jurisdiction.

(b) The wrongs alleged violated § 10(b) of the Exchange Act and Rule 10b-5 thereunder.

2. (a) Plaintiff brings this action as a class suit pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

(b) The class consists of all persons who bought stock of Tidal Marine International Corporation ("Tidal") from or through defendant Shearson, Hammill & Co., Inc. ("Shearson") from October 1, 1971 to August 2, 1972 ("the aforesaid period") as a result of solicitations by Shearson of purchase orders for Tidal securities.

(c) Plaintiff is a member of said class. On April 7, 1972, as a result of Shearson's solicitation, she bought

*Amended Complaint in Slade v. Shearson,  
Hammill & Co. Inc.*

from or through Shearson 200 shares of Tidal common stock at \$20.75 per share, a total price of \$4221.35 including commission. (A copy of Shearson's confirmation is annexed hereto as *Exhibit A*; the confirmation states that the order was solicited by Shearson.)

(d) The questions of fact common to all class members include: What was Shearson's knowledge or notice of Tidal's precarious financial position when it solicited members of the public during the aforesaid period to purchase Tidal's stock from or through Shearson?

(e) The questions of law common to all members of the class include: What duty of investigation and disclosure did Shearson owe to the persons who purchased Tidal stock from or through it during the aforesaid period?

(f) The class includes about 100 or more persons. They are so numerous that joinder of all class members is impracticable.

(g) Plaintiff's claim is typical of the claims of the other class members.

(h) Plaintiff will fairly and adequately protect the interests of the class.

(i) The questions of fact and law common to the members of the class predominate over any questions affecting only individual members.

(j) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3.(a) Shearson is a Delaware corporation, having its principal place of business in the Southern District of New York. It was at all times here relevant and now is registered as a broker-dealer under the Exchange Act and was and is engaged in business as a securities broker and investment banker. During the aforesaid period, Shearson

*Amended Complaint in Slade v. Shearson,  
Hammill & Co. Inc.*

was Tidal's investment banker and financial adviser; as such it had complete knowledge or notice of Tidal's financial condition. During the same period, Shearson was also the principal market maker for Tidal's stock in the over-the-counter market.

(b) During the aforesaid period, the investing public had little knowledge or information concerning Tidal. Persons buying Tidal's securities were necessarily guided or influenced by the advice of others.

4. Shearson solicited plaintiff and induced her to purchase 200 shares of Tidal common stock on April 7, 1972 from or through Shearson, for which plaintiff paid Shearson \$20.75 per share plus commission, a total of \$4,221.35.

5. During the aforesaid period, Shearson solicited numerous members of the public to buy shares of Tidal common stock. As the result of such solicitations, and during the aforesaid period, numerous members of the public purchased substantial amounts of Tidal's common stock from or through Shearson at the then market prices.

6. During the aforesaid period, Tidal's stock was traded in the over-the-counter market at prices slightly above or below \$20 per share.

7. In fact, Tidal was in a desperate financial position throughout the aforesaid period. On or about August 1, 1972 Tidal issued its annual report for 1971, which announced for the first time that Tidal had a "serious cash shortage". Said report was noted in the press on August 2, 1972.

8. As a result of the revelation, and of rumors preceding it for a brief period, the market price of Tidal's stock plunged to about \$2 per share.

*Amended Complaint in Slade v. Shearson,  
Hammill & Co. Inc.*

9. Throughout the aforesaid period, Shearson had knowledge or notice of Tidal's financial difficulties, but failed to reveal them to plaintiff and the other members of the public whom it solicited to buy Tidal stock or who purchased Tidal stock from or through Shearson.

10. Plaintiff and the other members of the class would not have bought Tidal stock but for Shearson's solicitation and its failure to reveal Tidal's financial difficulties.

11. (a) Plaintiff and the other members of the class paid Shearson prices amounting to slightly more or less than \$20 per share of the Tidal stock purchased by them from or through Shearson.

(b) By reason of Tidal's financial difficulties, the true value of its stock during the aforesaid period was about \$2 per share.

(c) By reason of the premises, plaintiff and the other members of the class sustained substantial damages.

(d) Trading in the stock of Tidal has been suspended since November 13, 1972.

12. By reason of the premises, Shearson, in connection with its sales of Tidal stock to plaintiff and the other members of the class, by the use of the means and instrumentalities of interstate commerce and the mails:

(a) employed a device or artifice to defraud;

(b) omitted to state material facts whose statement was necessary in order to make its solicitations of purchase orders for Tidal stock not misleading; and

(c) engaged in acts, practices and a course of business which operated or would operate as a fraud and deceit.



*Amended Complaint in Slade v. Shearson,  
Hammill & Co. Inc.*

Shearson's conduct was thus in violation of § 10(b) of the Exchange Act and Rule 10b-5 thereunder.

WHEREFORE plaintiff prays for judgment:

1. Declaring this action to be a proper class action;
2. Rescinding Shearson's sales of Tidal stock to plaintiff and the other members of the class;
3. Requiring Shearson to pay damages to plaintiff and the other members of the class;
4. Awarding plaintiff the expenses of this action, including reasonable counsel fees; and
5. Granting such other and further relief as may be just.

Dated: New York, N.Y.  
January 1973.

/s/ MORDECAI ROSENFELD  
MORDECAI ROSENFELD  
*Attorney for Plaintiff*  
233 Broadway  
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WO 4-1369

POMERANTZ LEVY HADEK & BLOCK, Esqs.  
295 Madison Avenue  
New York, N.Y. 10017  
532-4800  
*Of Counsel*

[Exhibit "A" is deleted.]

**Answer of Shearson, Hammill & Co. Inc. to Amended  
Complaint in Slade v. Shearson, Hammill & Co. Inc.**

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[SAME TITLE]

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Defendant Shearson, Hammill & Co. Incorporated ("Shearson"), by its attorneys Dewey, Ballantine, Bushby, Palmer & Wood, answers the Amended Complaint in this action as follows:

1. The allegations of paragraph 1 of the Complaint state conclusions of law to which no responsive pleading is required, except denies the allegation in paragraph 1(b) that Shearson committed any wrongs.

2. The allegations of paragraph 2 of the Complaint state conclusions of law to which no responsive pleading is required, except denies that plaintiff is a member of any class relevant to this action; denies the existence of any class including more than 100 purchasers who were solicited by Shearson and bought Tidal securities from Shearson; denies that the requisites of a class action are present; admits that plaintiff purchased 200 shares of the common stock of Tidal Marine International Corp. on a trade date of April 7, 1972, upon the solicitation of Shearson, at a price of  $20\frac{3}{4}$ ; and admits that Exhibit A to the Complaint is a xerox copy of a document which speaks for itself.

3. Denies the allegations contained in paragraph 3(a) of the Complaint, except admits that Shearson is a Delaware corporation and a registered broker-dealer in securities with a principal place of business at 14 Wall Street, New York, New York; that Shearson, at certain times, had

*Answer of Shearson, Hammill & Co. Inc. to Amended  
Complaint in Slade v. Shearson, Hammill & Co. Inc.*

an investment banking relationship with Tidal Marine International Corp. and made a market in Tidal common stock; and denies knowledge or information sufficient to form a belief as to the truth of the allegation that persons buying Tidal's securities were necessarily guided or influenced by the advice of others.

4. Admits the allegations contained in paragraph 4 of the Complaint, except denies knowledge or information sufficient to form a belief as to the truth of the allegation that Shearson induced plaintiff to purchase 200 shares of Tidal common stock.

5. Denies the allegations contained in paragraph 5 of the Complaint, except admits that Shearson solicited purchase orders for common stock of Tidal Marine International Corp. from certain of its customers.

6. Denies the allegations contained in paragraph 6 of the Complaint.

7. Denies the allegations contained in paragraph 7 of the Complaint, except admits on information and belief that in 1972, Tidal issued its annual report for 1971 and that, in 1972, Tidal announced that it had a "serious cash shortage."

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except admits, on information and belief, that Tidal stock has, at certain times, traded for about \$2 per share.

9. Denies the allegations contained in paragraph 9 of the Complaint, except admits that Shearson gave its custom-

*Answer of Shearson, Hammill & Co. Inc. to Amended  
Complaint in Slade v. Shearson, Hammill & Co. Inc.*

ers or made available to its customers all publicly available information about the financial condition of Tidal.

10. Denies the allegations contained in paragraph 10 of the Complaint.

11. Denies the allegations contained in paragraph 11 of the Complaint, except admits, on information and belief, that trading in Tidal Marine common stock was suspended on November 13, 1972.

12. Denies the allegations contained in paragraph 12 of the Complaint.

WHEREFORE defendant Shearson, Hammill & Co. Incorporated demands judgment dismissing this action, together with costs and disbursements, and any additional relief which the Court deems appropriate under the circumstances.

Dated: New York, New York  
February 2, 1973

DEWEY, BALLANTINE, BUSHBY,  
PALMER & WOOD

By /s/ RUSSEL H. BEATIE, JR.  
A Member of the Firm  
*Attorneys for Defendant*  
Office and P.O. Address:  
140 Broadway  
New York, New York 10005



Deposition of Melvin S. Slade, Transcript Pages 11-23

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[SAME TITLE]

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Deposition of plaintiff RENEE SLADE by MELVIN S. SLADE, taken by defendant pursuant to notice, at the offices of Dewey, Ballantine, Bushby, Palmer & Wood, Esqs., 140 Broadway, New York, N. Y. 10005, on March 2, 1973, at 10:15 a.m., before Harvey Keitel, a Shorthand Reporter and Commissioner of Deeds of the City of New York.

Appearances:

POMERANTZ, LEVY, HAUDEK & BLOCK, Esqs.,  
*Attorneys for plaintiff Renee Slade,*  
295 Madison Avenue,  
New York, N. Y. 10017

-and-

MORDECAI ROSENFELD, Esq.,  
233 Broadway,  
New York, N. Y. 10007

DEWEY, BALLANTINE, BUSHBY, PALMER &  
WOOD, Esqs.,  
*Attorneys for defendant,*  
140 Broadway,  
New York, N. Y. 10005

By: CHARLES E. D. JURRIST, Esq.,  
*Of Counsel*

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Q. Now, turning to the specific security which is involved in this litigation, which is the stock of Tidal Marine International Corporation, how did you first hear of that stock?  
A. Mr. Peress called me about it.

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

Q. So that was an occasion when he recommended a purchase to you, is that correct? A. Yes.

Q. If you can recall, was that one of the occasions when he supplied you with some sort of documentation at the time of the recommendation? A. Well, yes.

Q. And what sort of material was that, if you can recall? A. Well, he sent me some sort of a brochure prepared—

Q. Is that the brochure which you identified in answer to defendant's interrogatory number 9, which speaks of a brochure entitled "Tidal Marine International Corporation"? A. Yes.

Q. So he sent you that brochure? A. Yes.

Q. Do you recall his sending you anything else at the time of the recommendation? A. I do not recall.

Q. Do you recall having made the sort of independent investigation that we just discussed a moment ago with regard to the Tidal Marine purchase? A. Yes. I recall I did not.

Q. You did not make such an investigation. And so, to summarize, Mr. Peress telephoned you, recommended the purchase of the stock, sent you this brochure, and you gave him an order for the purchase? A. No, no.

Q. Would you tell me what did happen? A. Well, Mr. Peress called me over a course of weeks and perhaps even longer, maybe a half a dozen times about this stock. And it was ultimately at the end of the period that I gave him the order.

Q. I see.

Now, what was the substance of what he said to you over that course of weeks concerning this stock? A. Well, let's see, first—

MR. ROSENFELD: Before you answer, Mr. Slade, I do want to note that the complaint as explained in the answer to interrogatory 5 does not allege that any

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

employee of Shearson made representations to plaintiff or Mr. Slade in any way to Tidal Marine or its common stock. So I would ask you, Mr. Jurrist, whether your question relates to any specific paragraph in the complaint?

MR. JURRIST: No. My question is simply the witness has testified that an employee of Shearson, Hammill telephoned him perhaps as often as a half a dozen times with reference to this specific stock before he gave the order for purchase.

Now, I presume something must have been said in the course of those telephone conversations and I'm simply seeking to find out what it was.

MR. ROSENFELD: I have no reason not to permit Mr. Slade to answer. I just did want to point out that that question is not geared to any paragraph in the complaint.

A. Well, first he told me that Shearson, Hammill were (sic) the financial source and the investment bankers to Tidal Marine . . . That they had placed, I don't recall whether he said one or two, but private placements of securities issues for Tidal Marine as investment bankers. That he, as well as other customers' men, is that the correct term?

Q. That's one. A. Of Shearson were recommending this stock to their customers, to the Shearson customers. That he had spoken with the investment banker at Shearson, Hammill in charge of the account for Shearson, Hammill with respect to Tidal Marine, and had been given assurances of the nature and quality of the stock and the business. That the stock—that the company had a good record. That Shearson, Hammill knew all about the company, had made a thorough investigation of it and was fully familiar with its business and operations and finances.

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

Q. Do you recall his telling you that Shearson, Hammill was making a market in Tidal Marine common stock?

MR. ROSENFELD: Is that geared to a paragraph in the complaint?

MR. JURRIST: No.

MR. ROSENFELD: Answer anyway, for background, for the purpose of background information.

A. I think he did say that.

Q. Now, Mr. Slade, I must confess myself to be somewhat at a loss, in that the interrogatory which Mr. Rosenfeld has pointed to, interrogatory 5, which asks that you identify every employee of Shearson who made representations to you relating in any way to Tidal Marine International Corporation or its common stock.

And the answer was that plaintiff does not allege that any employee of Shearson made representations to her or to me relating in any way to Tidal Marine or its common stock.

Now, if that answer means to say that plaintiff does not allege that in her complaint, it's accurate. A. That's what it's meant to say.

MR. ROSENFELD: That's what it does say, plaintiff does not allege that any employee of Shearson, Hammill made representations to her or to me, the me being Mr. Slade, relating in any way to Tidal Marine or its common stock. Obviously, many things happen in the world that is not encompassed in the complaint. The fact they're not in the complaint doesn't mean they never happened. It just means that's not what we're suing Shearson, Hammill about.

MR. JURRIST: All I'm seeking to establish is that answer to the interrogatory is very precisely crafted



*Deposition of Melvin S. Slade, Transcript Pages 11-23*

to say that it is not alleged in the complaint that such representations were made.

THE WITNESS: That is correct.

MR. JURRIST: But it would be fair to summarize your most recent testimony, that you state that certain representations were made to you during the course of your conversations with Mr. Peress.

MR. ROSENFELD: Many things happened to Mr. Slade that are outside the complaint in his life, and that's one of them.

Q. Following the purchase of Tidal Marine, did you what we would say follow the stock, I mean both in terms of price action and in terms of following the press for any stories that might have appeared about it? A. Well, to the extent that they came to my attention.

Q. Do you now recall seeing anything specific about the stock in the press letter you saw prior to May of 1972? A. Well, I don't recall the significance of May '72, but I remember seeing in the press a whole series of articles about Tidal Marine, all of them extremely depressing.

Q. Well, could you go into somewhat more detail than the word depressing? A. Well, I remember seeing an announcement in the Wall Street Journal to the effect that Tidal Marine was having cash flow problems. That they had something like \$10 million worth of insurance claims unadjusted or unsettled.

This was just after the stock had been bought, no moderate length of time afterwards, a few months at most perhaps. From that point on other announcements like the stock was being suspended from trading. Other things of that nature.

Q. Now, the stock was bought in April of 1972, is that correct? A. That is correct.

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

Q. So it would be your testimony that you saw these articles in the summer, approximately, is that— A. Beginning spring and summer.

MR. ROSENFELD: Let me point out for the record, there were articles that appeared in the Wall Street Journal whenever they appeared and the index to the Wall Street Journal will indicate when those articles appeared.

Q. Would you be able to tell me now at approximately what price the stock was selling at the time the first of these depressing articles came to your attention?

MR. ROSENFELD: Let me just say for the record, that's a matter of public record. We can find out from the Wall Street Journal when the articles appear. We can find out from the same source the price of the stock. We don't have to tax his memory as to statistics. We can agree with you we would get the index as to the dates that it appeared and we can agree with you as to the price of the stock on those dates.

I just say, I think it's very hard for a witness to remember what the price was of a particular stock at a particular point in time when he can't even remember the point of time precisely.

MR. JURRIST: We all know as attorneys that it's perfectly adequate for the witness to answer a question by answering, I don't remember, if he doesn't.

MR. ROSENFELD: I suggest it's impossible for anybody to remember what the price of a stock would be when an article might have been read at a certain point within a few months period of time.

MR. JURRIST: And I suggest to you it is impossible for you to say whether some fact might have stuck in

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

Mr. Slade's mind that you don't know about and he can certainly tell me if he doesn't remember things.

A. I don't recall.

Q. When these depressing articles began to appear, did you discuss with Mr. Peress the—did you have any further discussions with him about the stock at that time? A. Oh, yes.

Q. What would you summarize for me were the character of those discussions?

MR. ROSENFELD: Is that geared to any paragraph of the complaint?

MR. JURRIST: No.

MR. ROSENFELD: Nevertheless, rather than object, we'll permit you to answer, Mr. Slade, to provide whatever background material Mr. Jurrist thinks might be relevant.

A. I had called Mr. Peress and asked him in effect to advise me whatever was going on. And, as I recall it, he told me that he had been instructed by Shearson, Hammill not to discuss it.

Q. Did you at any time prior to the suspension of trading in the stock suggest to Mr. Peress that it might—that you wished to sell the stock?

MR. ROSENFELD: Again, is that geared to any specific paragraph of the complaint?

MR. JURRIST: No, sir, that is in the—

MR. ROSENFELD: Nevertheless, rather than—

A. I don't recall.

Q. You have not, however, sold the stock, is that correct?

A. No, I have not.

*Deposition of Melvin S. Slade, Transcript Pages 11-23*

Q. Mrs. Slade still owns it? A. Yes.

Q. I believe you testified earlier, Mr. Slade, that in your discussions with Mr. Peress at the time he recommended the stock purchase to you, he told you that he and other Shearson investment executives were recommending the purchase of Tidal Marine to other customers of Shearson, Hammill, is that right?

MR. ROSENFELD: Just for the record, Mr. Jurrist, is that geared to any particular paragraph in the complaint?

MR. JURRIST: Yes, sir. That is geared to paragraph 5 of the complaint.

THE WITNESS: Would you repeat the question, please.

(The question was read.)

MR. ROSENFELD: Let me just say that that same question was asked in interrogatory 11, I believe, and Mr. Slade answered, Mr. Peress so advised me.

A. That is right.

MR. JURRIST: I'm trying to get a little bit more precise at the moment.

Q. I believe you testified earlier at this session that Mr. Peress told you that he and other Shearson investment executives were recommending the purchase of the stock to other customers than yourself, is that correct? A. That is correct.

Q. Now, do you recall whether Mr. Peress ever stated to you that Shearson, Hammill as a firm was recommending the purchase of Tidal Marine, that it was a firm buy recommendation? A. Well, he simply said that Shearson, Ham-



*Deposition of Melvin S. Slade, Transcript Pages 11-23*

mill was recommending it. I don't know the distinction you're trying to make.

Q. The distinction I'm trying to make, if you can recall the conversations, and I recall time has passed, the distinction between his saying to you Shearson, Hammill is recommending the purchase of the stock, and his saying to you, I and several other brokers in my office are recommending the purchase of this stock to our customers.

A. He did not say that, the latter. He said that Shearson, Hammill was recommending it.

MR. JURRIST: I have no further questions.

MR. ROSENFELD: We have none.

(Time noted: 10:45 a.m.)

/s/ MELVIN S. SLADE

Subscribed and sworn to before me this  
2nd day of April 1973.

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**Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.**

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[SAME TITLE]

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SIRS:

The within are the Answers on behalf of Plaintiff Slade  
to Defendant's Preliminary Interrogatories (Revised).

Dated: New York, N. Y.  
February 14, 1973

Yours, etc.

POMERANTZ LEVY HADEK &  
BLOCK

*Counsel to Plaintiff Slade*  
295 Madison Avenue  
New York, N. Y. 10017

and

MORDECAI ROSENFELD  
*Attorney for Plaintiff Slade*  
233 Broadway  
New York, N. Y. 10007

To:

MESSRS. DEWEY, BALLANTINE, BUSHBY,  
PALMER & WOOD, ESQS.  
*Attorneys for Defendant*  
140 Broadway  
New York, N. Y. 10005

*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

PLAINTIFF RENEE SLADE'S ANSWER TO  
DEFENDANT'S PRELIMINARY INTERROGATORIES  
(REVISED)

Plaintiff, Renee Slade, answering defendant's Preliminary Interrogatories (Revised), states that all transactions concerning her account with defendant, including her purchase of shares of stock of Tidal Marine International Corp., were effected by her husband, Melvin Slade; that she has no personal knowledge of any of the matters referred to in defendant's Preliminary Interrogatories (Revised); that her said husband alone is familiar with such matters; that his answers to said Interrogatories are annexed hereto; and that plaintiff adopts such answers as her own upon information and belief.

Dated: New York, New York  
February 13, 1973

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VERIFICATION

(Verified by Renee Slade on February 13, 1973.)

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ANSWERS OF MELVIN SLADE TO DEFENDANT'S  
PRELIMINARY INTERROGATORIES (REVISED)

Melvin Slade, the husband of plaintiff herein, answering defendant's preliminary Interrogatories (Revised) hereinafter called "Interrogatories"), states:

*Interrogatory 1*

With regard to the account maintained by plaintiff with Shearson, Hammill & Co. Incorporated ("Shearson"), state:

- (a) the date when the account was opened;

*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

(b) whether plaintiff executed a power of attorney authorizing any employee of Shearson to trade in the account; and

(c) whether plaintiff continues to maintain the account with Shearson.

*Answer*

(a) Plaintiff's account with Shearson was opened in August, 1971.

(b) Plaintiff executed no power of attorney authorizing any employee of Shearson to trade in the account.

(c) Plaintiff continues to maintain the account with Shearson.

*Interrogatory 2*

Summarize the investment objectives which plaintiff had for the account and identify every employee of Shearson to whom plaintiff communicated those objectives.

*Answer*

Neither plaintiff nor I had any particular investment objectives for the account or communicated any such objectives to any employee of Shearson. We hoped for the appreciation of plaintiff's investments and/or some income therefrom.

*Interrogatory 3*

Identify all broker-dealers with which plaintiff now maintains, or ever has maintained, accounts for the purchase and sale of securities.

*Answer*

On and prior to November 30, 1971 plaintiff maintained an account for the purchase and sale of securities with Kidder, Peabody & Co.



*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

*Interrogatory 4*

Identify every employee of Shearson with whom plaintiff has had personal dealings during the time she has maintained an account with Shearson.

*Answer*

During the time plaintiff has maintained an account with Shearson, she had no personal dealings with any employee of Shearson. The employee of Shearson with whom I dealt with respect to plaintiff's account was Mr. Richard Peress. On several occasions another employee of Shearson called me on behalf of Mr. Peress in his absence; I do not recall his name.

*Interrogatory 5*

Identify every employee of Shearson whom (sic) plaintiff claims made representations to her, relating in any way to Tidal Marine International Corp. ("Tidal Marine") or its common stock.

*Answer*

Plaintiff does not allege that any employee of Shearson made representations to her or to me relating in any way to Tidal Marine or its common stock.

*Interrogatory 6*

With regard to each person identified in answer to the previous interrogatory, state separately:

- (a) the substance of the representations made;
- (b) the date when and the place where the representations were made;

*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

(c) the identity of all persons present when the representations were made.

*Answer*

Not applicable.

*Interrogatory 7*

Identify all persons other than employees of Shearson from whom plaintiff received any information concerning Tidal Marine or its common stock.

*Answer*

None.

*Interrogatory 8*

With regard to each person identified in answer to the previous interrogatory, state separately:

(a) the substance of the information which plaintiff received from that person;

(b) the date when and the place where plaintiff received such information;

(c) the identity of all persons present when the information was received.

*Answer*

Not applicable.

*Interrogatory 9*

Identify every document relating to Tidal Marine or its common stock which was transmitted or shown to plain-

*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

tiff by Shearson or any of its employees and, for each document so identified, state:

(a) the date when it was transmitted or shown to plaintiff;

(b) the identity of the Shearson employee who transmitted or showed it to plaintiff.

*Answer*

Mr. Peress sent me a brochure entitled "Tidal Marine International Corporation", describing Tidal Marine. In the inside back cover of that brochure were inserted two mimeographed sheets: One was a pro forma condensed balance sheet of Tidal Marine as of September 30, 1971; the other was a pro forma income statement of Tidal Marine for the nine months ending September 30, 1971. I do not remember the date when I received that brochure.

After the public disclosure of Tidal Marine's financial difficulties and after the market price of the stock of Tidal Marine had substantially declined, Mr. Peress sent me Xeroxed copies of articles in the Wall Street Journal about Tidal Marine's difficulties.

*Interrogatory 10*

Identify every document relating to Tidal Marine or its common stock which plaintiff received from or was shown by, any source other than Shearson or its employees and, for each document so identified, state:

(a) the source from which plaintiff received or was shown the document;

(b) the date when it was received or seen by plaintiff.

*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

*Answer*

None, except documents shown and discussed by plaintiff's attorney, Mr. Mordecai Rosenfeld, in connection with this action. The communications from and to Mr. Rosenfeld are privileged.

*Interrogatory 11*

State the basis for the allegation, contained in paragraph 5 of the amended complaint, that Shearson induced persons other than plaintiff to purchase Tidal Marine common stock.

*Answer*

Mr. Peress so advised me.

*Interrogatory 12*

State the basis for the allegation, contained in paragraph 9 of the amended complaint, that Shearson had knowledge or notice of the financial difficulties of Tidal Marine.

*Answer*

Shearson was Tidal Marine's investment banker and financial adviser (see the brochure referred to in the answer to Interrogatory 9, above). In April 1972 Shearson reportedly arranged an \$8 million bank loan for Tidal Marine (see *Standard & Poor's, Standard Corporation Descriptions, T-Z, June-July 1972*, p. 3770). Mr. Peress advised me that Shearson was thoroughly familiar with Tidal Marine's financial condition and was soliciting members of the public to purchase the stock of Tidal Marine.



*Answers to Defendant's Preliminary Interrogatories  
in Slade v. Shearson, Hammill & Co. Inc.*

*Interrogatory 13*

Does plaintiff still own the 200 shares of Tidal Marine common stock, the purchase of which is alleged in paragraph 2(c) of the amended complaint? If not, state when these shares were sold; at what price they were sold; and the name of the broker(s) through which they were sold.

*Answer*

Plaintiff still owns the 200 shares of Tidal Marine common stock, the purchase of which is alleged in paragraph 2(c) of the amended complaint.

Dated: New York, New York  
February 13, 1973

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[VERIFICATION]

(Verified by Melvin Slade on February 13, 1973.)

**The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"**

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[SAME TITLE]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

SIDNEY T. BOGARDUS, being duly sworn, deposes and says:

1. I am a First Vice-President of Shearson, Hammill & Co. Incorporated ("Shearson"), I am a voting stockholder in Shearson, I am a member of Shearson's Corporate Finance Department, and I am in charge of new investment banking business.

2. I make this Affidavit in opposition to plaintiff Slade's motion to have this action declared a class action, in opposition to plaintiff Odette's cross-motion to have subclasses designated, and in support of Shearson's cross-motions for partial summary judgment and to strike the class action allegations.

3. Shearson's Corporate Finance Department handles the firm's investment banking relationships. As a member of that department, I worked with the principals of Tidal Marine International Corporation ("Tidal Marine") during the course of Shearson's relationship with that company; and I am personally familiar with the details of Shearson's investment banking relationship with Tidal Marine.

**SHEARSON'S POLICIES**

4. Shearson is divided essentially into two parts: the Corporate Finance Department, which performs the firm's

*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

investment banking functions, and the Retail Sales Organization, which handles retail transactions with Shearson's customers through the firm's branch organization. The retail brokerage business is performed by Shearson's investment executives, who are a part of the branch office organization.

5. From time to time during the course of Shearson's activities as investment banker for any company, Shearson acquires information about the company which is not generally available to the investment public. In fact, the investment banker is derelict in the performance of his duties, as I understand them to be defined by law and by custom and usage in the trade, if he does not investigate his investment banking clients in great depth.

6. Non-public information obtained by the Corporate Finance Department in the course of an investment banking relationship is not disseminated outside the Department.

7. If events occur of a material nature involving any investment banking client, Shearson's policy governing information of this sort is now, and was throughout the firm's relationship with Tidal Marine, to urge the company to disclose to the public any matters which Shearson believes the public ought to know.

8. In the event that the company fails to make disclosure which Shearson deems adequate, or behaves in any other way the firm deems inimical to the public interest, Shearson will resign as investment banker.

9. If the circumstances warrant, Shearson will take steps to see that the information in its possession is brought to the attention of the appropriate government body or regulatory agency.

*The Affidavit of Sidney T. Bogardus in Support of  
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10. As a matter of policy, the firm does not recommend the purchase of securities issued by investment banking clients and, to the best of my knowledge, it never has.

SHEARSON'S DEALINGS WITH TIDAL MARINE

11. Shearson first became acquainted with Tidal Marine in June of 1971, whereupon it undertook an intensive investigation of the company. This investigation included an inspection of the company's facilities in Greece by Michael Palmer, Shearson's vice-president in charge of European investment banking activities. It also involved discussions, in New York, London, and Greece, with Tidal Marine's own personnel and with financial institutions, ship brokers, marine insurance brokers, and other elements of the shipping industry. Shearson received favorable responses to its inquiries about Tidal Marine as a result of which, in September of 1971, the firm accepted Tidal Marine as an investment banking client. In October, Shearson began to make a market in Tidal Marine's common stock.

12. In 1972, Shearson undertook, as investment banker for Tidal Marine, to arrange for a private placement of the company's securities with institutional investors. No such private placement was actually made but the necessary investigations connected with it did go forward during the spring of 1972. Also in the spring, in contemplation of a proposed secondary offering of Tidal Marine's common stock, Shearson terminated its activities as a market-maker and withdrew from the "sheets" on or about March 16, 1972. Attached to this affidavit as Exhibit A is a copy of the relevant National Daily Quotation Service sheet or "pink sheet" for March 17, 1973. This sheet shows that, as of that date, Shearson was no longer making bids on Tidal Marine's common stock.



*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

13. Neither in its capacity as investment banker to Tidal Marine nor in any other capacity did Shearson learn that Tidal Marine had any financial or operational difficulties until, at the end of May, 1972, Shearson learned that the company had a shortage of cash.

14. Pursuant to the standard business practice of the shipping industry, Tidal Marine had insured all of its ships against certain contingencies, including the cost of repairing possible damage to the ships and loss of revenues while such ships were under repair.

15. In late 1971 and early 1972, several vessels in Tidal Marine's fleet were damaged. Shearson was advised by representatives of the company that the injuries amounted to an unusually large percentage of the fleet but that the damage and the revenues lost as a result of the damage were fully insured.

16. On a short term basis, however, Tidal Marine would immediately lose the revenues which would have been earned had the ships not been damaged and would also incur the cost of repairing the ships. This would impair the company's cash flow in two ways: payment for repairs would increase the outflow of cash, and loss of revenue would decrease the inflow of cash.

17. In the meantime, the insurance claims would be processed; but payment of claims would ordinarily require a period of six months to one year. The net result of this difficulty was a cash shortage for the company.

18. When these financial difficulties were first disclosed by Tidal Marine, in May 1972, they were investigated by Shearson and by various banks and other financial institutions which had lent money to the company. As a result of

*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

this investigation, all parties concluded that the difficulties were temporary and could be alleviated by restructuring the company's debt.

19. During the months of June and July, the company had continuous discussions with its lenders in order to restructure the company's debt on its ship mortgages.

20. During June and July, I and other Shearson personnel were in frequent, if not continuous, contact with the company and with its lenders. The problem caused by the cash shortage appeared soluble. All parties negotiated constructively to alleviate Tidal Marine's cash shortage by restructuring the repayment of Tidal Marine's secured debt, in order to reduce the cash demands for a period of time.

21. By the latter part of July, no final resolution of the problem had been derived. At that time, I and other Shearson personnel repeatedly urged the company to make a public statement about its current cash shortage and its negotiations with its lenders.

22. Finally, toward the end of the month, we advised the company that, if it failed to make a proper public announcement, Shearson would be compelled to disclose the company's current cash shortage and its negotiations with its lenders to an appropriate regulatory agency.

23. On or about July 31 or August 1, this information was reported to the Securities and Exchange Commission. On or about August 2, the company issued a press release disclosing its current cash shortage, its negotiations with its lenders, and its unaudited earnings for the first quarter of 1972.

*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

24. Approximately one week later, Shearson formally terminated its investment banking relationship with Tidal Marine. Since that time it has not provided Tidal Marine with financial or investment banking services of any kind and has received no information about the current condition of the company other than that available to the general public.

SHEARSON'S INTERNAL WIRES ABOUT TIDAL MARINE

25. During the entire period that Shearson had any dealings with Tidal Marine, i.e., from June of 1971 to August of 1972, the Corporate Finance Department prepared and distributed to the retail sales organization a variety of wires dealing with the company. A copy of each of these wires is attached to this Affidavit and made a part of it as an exhibit. The wires were as follows:

- (a) Corporate Finance Bulletin, dated October 26, 1971 (Exhibit B).
- (b) Corporate Finance Bulletin, dated December 15, 1971 (Exhibit C).
- (c) Corporate Finance Bulletin, dated June 23, 1972 (Exhibit D).
- (d) Corporate Finance Bulletin, dated August 2, 1972 (Exhibit E).
- (e) Corporate Finance Bulletin, dated August 11, 1972 (Exhibit F).
- (f) Corporate Finance Bulletin, dated September 6, 1972 (Exhibit G).

26. I prepared or reviewed each wire before it was distributed to the retail sales organization. To the best of

*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

my knowledge, all of them were based entirely on public information, and most of them were verbatim quotations of public statements issued by Tidal Marine.

27. Some of these wires bear the legend, "Absolutely not for distribution." Pursuant to the standard business practice of the firm, investment executives were prohibited from giving these wires to their customers but the policy of the firm required the investment executive to use the content of the wire when he discussed the company with his customers.

28. As explained earlier in this Affidavit, Shearson, as a matter of policy, does not recommend the purchase of securities issued by companies for whom Shearson is investment banker. Shearson's recommendations are made through its Master Buy List.

29. When a security is recommended for purchase, it is placed on the Master Buy List and will remain continuously on that list until the firm recommends that the security be sold.

30. Throughout the period of time that the security appears on the Master Buy List, it will be recorded as a "purchase", which means that the firm recommends the purchase of the securities by customers for whom it is suitable; a "hold", which means that those persons who own the security should continue to own it; or a "sale", which means that the customers who own the security should dispose of it.

31. I have personally reviewed all of the Master Buy Lists for the entire period of time that Shearson was investment banker for Tidal Marine, October of 1971 through



*The Affidavit of Sidney T. Bogardus in Support of  
Defendant's Cross-Motion, Excluding Exhibit "A"*

August of 1972. Tidal Marine does not appear in any form on those lists.

32. None of the Master Buy Lists, including the lists for the months of February and April, 1972, when plaintiffs Slade and Odette purchased their Tidal Marine securities through Shearson, are attached to this Affidavit because Shearson considers these documents highly confidential. However, should the court require verification of the fact that Tidal Marine was not listed on any Master Buy List for the relevant period, I will be happy to submit them to the Court for examination *in camera*.

33. To the best of my knowledge, all written material relating to Tidal Marine which was created by Shearson, and which was distributed to Shearson's retail sales force, is attached to this affidavit.

/s/ SIDNEY T. BOGARDUS  
Sidney T. Bogardus

[Sworn to May 24, 1973.]

[Exhibit "A" is Omitted]

## Exhibit B

October 26, 1971

## ABSOLUTELY NOT FOR DISTRIBUTION

TIDAL MARINE INTERNATIONAL CORP. (OTC—14 Bid 14¾  
Asked)

Tidal Marine International Corp. has reported the following results for the six months ended June 30, 1971:

	Thousands of Dollars		
	6 Months to June 30		Year Ended
	1971 Audited	1970 Unaudited	1970 Audited
Total Revenues and Other Income .....	\$9,335	\$1,982	\$8,109
Net Income .....	1,501	473	1,469
Earnings Per Share .....	\$.71	\$.30	\$.91
Average Weighted Shares Outstanding .....	2,102,765	1,598,870	1,610,523

Management has released the following letter to its shareholders:

“Tidal has purchased 28 ships this year, thereby completing its 1971 acquisition program. Our fleet now consists of 41 vessels approximating 700,000 deadweight tons. The value of our fleet is more than \$50,000,000.

The majority of our revenues and net income is generated from charters with major international oil companies. The termination dates of these charters are staggered over the next four years, the result of which is that our ships will be available for new charters at different levels of the charter market. Approximately 80% of your Company's tonnage are in charters which expire in 1973 and beyond.

It is important to understand that the much publicized decline in charter rates relates primarily to the spot charter market (i.e. short term charters—less than 1 year in dura-

*Exhibit B*

tion). This market has plunged to 30% of its previous high this year. Your company is not interested in trying to anticipate this market. Tidal's policy is to obtain medium and long term charters. These charter rates have also declined sharply this year, but less severely. Because of our chartering policy, our fleet's overall revenue should not suffer materially even if rates should remain at these levels thru 1972.

Now that we have a fleet of sufficient size to afford economies of scale, especially in the purchase of Insurance and Bunkers, we are entering the second phase of our long term growth program. Expansion of our fleet will continue on a selective basis in keeping with our overall corporate objectives."

SUSAN R. LANE

Attention is called to the fact that Shearson, Hammill & Co. Incorporated is acting as financial advisor in connection with the private placement of securities of Tidal Marine International Corp. and maintains a market in the stock. This wire should not be construed as an endorsement or recommendation of the company's securities.

## Exhibit C

December 15, 1971

## TIDAL MARINE INTERNATIONAL CORP. (OTC—13-13¾)

Tidal Marine International Corp. has recently reported the following results for the nine months ended September 30, 1971:

	Thousands of Dollars		
	Nine Months Ended Sept. 30		Year Ended Dec. 31,
	1970	1971	1970
Total Revenues and Other Income .....	\$4,256	\$16,097	\$8,109
Net Income .....	1,084	2,602	1,469
Earnings Per Share .....	\$.56	\$1.09	\$.91

Tidal Marine is a US company which owns a fleet of 41 vessels mainly under Greek and Liberian flags, with a total of more than 740,000 DWT of which two-thirds is tanker tonnage. The book value of this fleet at September 30 was more than \$70 million.

Tidal took delivery of its first ship during the second half of 1969. The rapid expansion of its fleet and net income is attributed to the following factors:

(1) Tidal has been successful in maintaining and operating relatively old vessels to the high standards required by such charterers as British Petroleum, Esso, Shell, ICI and AGIP which provide approximately three quarters of Tidal's revenues.

(2) By obtaining charters from companies such as the major aforementioned international oil companies, Tidal has been able to secure borrowings from leading banks, including FNB Boston, Bank of America, FNCB and The NB of North America. Tidal's ability to leverage is demonstrated by the \$8 million five year revolving credit it is obtaining from BTI.



*Exhibit C*

(3) As a publicly traded company, Tidal has the advantage of using its common stock in part payment for some of the ships it has acquired. Tidal has persuaded the owners of several fleets to join Tidal and to continue to operate their ships under the Tidal flag. This policy has both accelerated the growth of Tidal's fleet and provided experienced managers for its newly acquired ships.

(4) There are significant economies of scale involved in operating a large fleet compared to running a few ships. Bunkering, insurance and stores costs have been reduced by approximately 20% compared to such costs for Tidal's first ship.

We advise caution in placing orders for the shares because of a thin market.

SIDNEY T. BOGARDUS  
JOHN L. HIGGINS

Attention is called to the fact that Shearson, Hammill & Co. Incorporated is acting as financial advisor in connection with the private placement of securities of Tidal Marine International Corp. and maintains a trading market in the stock. This wire should not be construed as an endorsement or recommendation of the Company's securities.

## Exhibit D

June 23, 1972

TIDAL MARINE INTERNATIONAL CORPORATION  
(TDMT—OTC—16—16 3/4)

The Company has issued the following press release:

Tidal Marine International Corporation and subsidiaries today announced estimated consolidated results for calendar 1971 (compared with the year earlier). Earnings per share from continuing operations increased to \$1.43. When including extraordinary credits, the earnings come to \$1.99 per share. At year end the book value less accumulated depreciation of the fleet was \$69,000,000.

	Year Ended December 31	
	1971	1970
Total Revenues .....	\$27,085,320	\$8,109,423
Income from continuing operations ..	3,880,543	1,470,301
(loss) from discontinued operations ..	—	(74,058)
Extraordinary credits, net .....	1,518,313	1,560,022
Net income .....	\$ 5,398,856	\$2,956,265
Earnings per common share		
Income from continuing operations .....	\$1.43	\$0.91
(Loss) from discontinued operations .....	—	(0.04)
Extraordinary credits .....	0.56	0.97
Net income .....	\$1.99	\$1.84

Tidal Marine is a public corporation with headquarters in New York engaged in the world-wide movement of oil, iron ore, grains and other bulk cargoes. It has grown to its present size in less than three years. It

*Exhibit D*

recently expanded into ship repair and shipbuilding, with a facility in Greece, and it is studying the construction and operation of new, highly sophisticated types of ocean ships for future service, the Company said.

MICHAEL J. ROSENTHAL  
VICE PRESIDENT

Attention is called to the fact that Shearson, Hammill & Co. Incorporated has in the past acted as financial advisor in connection with the private placement of securities of Tidal Marine International Corp. and has maintained a trading market in the stock. This wire should not be construed as an endorsement of recommendation of the Company's securities.

**Exhibit E****TIDAL MARINE INTERNATIONAL CORPORATION**  
**(TDMT—OTC—5—6 3/4)**

The Company has issued the following press release:

Tidal Marine International Corp. stated today that it is engaged in discussions with certain banks and financial institutions with a view toward securing additional financing required as a result of a serious cash shortage. The Company attributed this shortage principally to an unusually large number of insurance claims, the settlement of which normally requires six to twelve months.

Tidal Marine also announced that its first quarter earnings for the period ended March 31, 1972 were \$.43 per share. This reflects approximately a 19% increase per share over the same period last year.

	1972 First Quarter (unaudited)	1971 First Quarter (unaudited)
Gross Revenues .....	\$8,237,108	\$3,797,064
Net Income .....	\$1,531,402	\$ 705,695
Earnings Per Share .....	\$.43	\$.36

Tidal Marine, a public corporation headquartered in New York City, owns forty-four vessels engaged in the world wide movement of oil, iron ore, grains and other bulk cargoes. It recently expanded into ship repairs and shipbuilding with a facility in Greece.

**MICHAEL J. ROSENTHAL**  
**VICE PRESIDENT**

Attention is called to the fact that Shearson, Hammill & Co. Incorporated has in the past acted as financial advisor in connection with the private placement of securities of Tidal Marine International Corp. This wire should not be construed as an endorsement or recommendation of the Company's securities.



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**Exhibit F**

August 11, 1972

All Wires # 302

**TIDAL MARINE INTERNATIONAL CORPORATION**

Tidal Marine International Corporation on August 2 issued a press release describing its current efforts to alleviate its present shortage of cash and also released its earning for the first quarter of 1972, which ended on March 31. Since that time Tidal Marine has made no additional statements. For this reason Shearson, Hammill has inadequate information to formulate any investment advice relating to this security.

**SIDNEY BOGARDUS**

Shearson, Hammill & Co., Incorporated has in the past performed investment banking services for Tidal Marine International Corporation. Such relationship should not be construed as an endorsement for the Company's securities.

**The Affidavit of Richard Peress in Support of  
Defendant's Cross-Motion**

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[SAME TITLE]

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STATE OF NEW YORK    }  
COUNTY OF NEW YORK } ss.:

RICHARD PERESS, being duly sworn, deposes and says:

1. I reside at 59 Livingston Street, Brooklyn, New York and I am an investment executive employed by Shearson, Hammill & Co. Incorporated ("Shearson"). I have handled the account of Renee Slade throughout the period of time relevant to this lawsuit.

2. I make this Affidavit in opposition to Slade's motion to have this action declared a class action, in opposition to Odette's cross-motion to have sub-classes designated, and in support of Shearson's cross-motion for partial summary judgment and to strike the class action allegations.

3. Throughout the period of time that I have been in charge of Mrs. Slade's account, the investment objective for the account has been capital gains, to be achieved primarily through the purchase and sale of speculative securities.

4. In the late autumn of 1971, I recommended the purchase of the common stock of Tidal Marine International Corp. ("Tidal Marine") to various members of Mrs. Slade's family.

5. I first heard of Tidal Marine in approximately July of 1971. I familiarized myself with the publicly available

*The Affidavit of Richard Peress in Support of  
Defendant's Cross-Motion*

information about the company, including the fact that it had good earnings, that it had raised several million dollars through private financings prior to the end of 1971, and that it had a good record of growth.

6. On the basis of my information and investigation, I recommended the purchase of Tidal Marine in the various Slade accounts for which I was the investment executive.

7. The trade date of the purchase was April 7, 1972 and it settled on April 14, 1972.

8. Subsequent to the transaction, I sent to the customer a pamphlet about Tidal Marine which had been prepared and distributed by Tidal Marine; and I also sent a research report prepared by the investment banking firm of Bacon, Whipple & Co. recommending the purchase of the common stock of Tidal Marine.

9. At the time I recommended the purchase of Tidal Marine by the various Slade accounts, including the account of Renee Slade, I had no information that the company had any material business or financial problems not disclosed in publicly available documents. I first learned of serious difficulties being experienced by the company when it issued a press release in August of 1972 disclosing a shortage of cash.

/s/ RICHARD PERESS  
Richard Peress

[Sworn to May 24, 1973.]

**The Affidavit of Abraham L. Pomerantz in Support of  
Plaintiff's Motion and In Opposition to  
Defendant's Cross-Motion**

---

[SAME TITLE]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

Abraham L. Pomerantz, being duly sworn, deposes and says:

1. I am a member of Pomerantz Levy Haudek & Block, general counsel (together with Mordecai Rosenfeld) for the plaintiffs in this class action suit against Shearson Hammill ("Shearson"). I submit this affidavit for three purposes: To support our motion for a class action determination under Federal Rule 23(b)(3); to oppose defendant Shearson Hammill's motion pursuant to Rule 56(b) for partial summary judgment; and to oppose the motion by plaintiff Odette for subclasses.

**Plaintiffs' Motion for A Class Action Determination  
Pursuant to Federal Rule 23(b)(3)  
Should Be Granted.**

2. The facts supporting plaintiff's class action motion are set forth in my affidavit of April 13, 1973, and we will not burden the Court with a full repetition. What should be noted is that much of Shearson's attack on plaintiff's class action motion concerns Slade's original complaint, not the amended complaint which is before the Court. The amended complaint contains no allegation that any representation or misrepresentation was oral; rather the essence of that complaint is the allegations that "Shearson solicited numer-



*The Affidavit of Abraham L. Pomerantz in Support of  
Plaintiff's Motion and In Opposition to  
Defendant's Cross-Motion*

ous members of the public to buy shares of Tidal Marine common stock (Amend. complaint, ¶ 5) during a time when "Tidal was in a desperate financial position" (Amend. complaint, ¶ 7), and that "[T]hroughout the aforesaid period, Shearson had knowledge or notice of Tidal's financial difficulties" (Amend. complaint, ¶ 9). Shearson's answer to the amended complaint concedes that Shearson solicited numerous members of the public to buy shares of Tidal (Answer to amend. complaint, ¶ 2) and that Tidal was, in fact, in a desperate financial situation (Answer to amend. complaint, ¶ 7) but vigorously denies that it had notice or knowledge of Tidal's plight. The point here is that no facts relating to oral representations are relevant to this motion; our accompanying Memorandum of Law discusses this in greater detail.

Defendants' Motion for Partial Summary Judgment  
pursuant to Rule 56(b).

3. We note at the outset that defendant Shearson has not submitted a Statement as required by Local Rule 9(g).

4. The essential fact asserted by Shearson by way of the affidavits submitted in support of its partial summary judgment motion is that it did not know, until May 1972, that Tidal was experiencing grave financial difficulties (see affidavit of Sidney T. Bogardus, par. 13).

5. The amended complaint, however, alleges that "Shearson had knowledge or *notice* of Tidal's financial difficulties" (par. 9). We suggest that defendant's own papers concede that Shearson had "knowledge or *notice*"

*The Affidavit of Abraham L. Pomerantz in Support of  
Plaintiff's Motion and In Opposition to  
Defendant's Cross-Motion*

of Tidal's grave financial problems. Thus Mr. Bogardus' own affidavit contains these admissions:

"15. In late 1971 and early 1972, several vessels in Tidal Marine's fleet were damaged. Shearson was advised by representatives of the company that the injuries amounted to an unusually large percentage of the fleet but the damage and the revenues lost as a result of the damage were fully insured.

16. On a short term basis, however, Tidal Marine would immediately lose the revenues which would have been earned had the ships not been damaged and would also incur the cost of repairing the ships. This would impair the company's cash flow in two ways: payment for repairs would increase the outflow of cash, and loss of revenue would decrease the inflow of cash.

17. In the meantime, the insurance claims would be processed; but payment of claims would ordinarily require a period of six months to one year. The net result of this difficulty was a cash shortage for the company."

6. Admittedly, therefore, "Shearson was advised in late 1971 and early 1972" that Tidal's vessels were damaged; that the "injuries amounted to an unusually large percentage of [Tidal's] fleet" and that Tidal was experiencing a substantial loss of revenue and a substantial repair cost. Surely, therefore, Shearson was, at the very least, on notice in 1971 or early 1972—if, in fact, it didn't possess the actual knowledge—that Tidal was in grave financial trouble.

7. The only excuse Mr. Bogardus gives for not "knowing" in 1971 or early 1972 that Tidal was in financial

*The Affidavit of Abraham L. Pomerantz in Support of  
Plaintiff's Motion and In Opposition to  
Defendant's Cross-Motion*

trouble is the bland assurance he received from Tidal "that the damage and the revenues lost as a result of the damage were fully insured". (Bogardus aff., p. 15). But Mr. Bogardus nowhere states that he even checked Tidal's assurances with the insurance companies involved; but even Mr. Bogardus always knew that, at best, even if the insurance claims were going to be paid, it "would ordinarily require a period of six months to one year". And Mr. Bogardus concedes that: "The net result of this difficulty was a cash shortage for [Tidal]" (Bogardus aff., par. 17).

8. In short, at an absolute minimum, there is more than some doubt from Shearson's own motion papers as to what it knew—or should have known—by late 1971 or early 1972. Shearson's own papers seem to indicate that Shearson knew all about Tidal's problems in late 1971 or early 1972. Surely it cannot be said—as Shearson must say for it to prevail on summary judgment—that under no circumstances did Shearson know—or could it have known—of Tidal's plight before May, 1972.

9. Plaintiffs, as they investigate this case, might learn that Shearson, knowing of the damage to Tidal's vessels, never even sought the advice of Tidal's insurance companies concerning whether the claims would be honored, or when; or they might learn that the insurance companies indicated to Shearson that Tidal's claims would not be honored; or they might learn that Shearson knew all the facts in late 1971 or early 1972 (as Mr. Bogardus himself indicates) but just ignored them or evaluated them incorrectly. These are but some of the facts that might emerge from a deeper look, by plaintiffs, into Shearson's handling of Tidal's difficulties.

*The Affidavit of Abraham L. Pomerantz in Support of  
Plaintiff's Motion and In Opposition to  
Defendant's Cross-Motion*

10. The other "fact" relied upon by Shearson in its summary judgment motion is the "fact" that Shearson did not really recommend the purchase of Tidal because Tidal wasn't on Shearson's "Master Buy List". (Bogardus aff., pars. 28-31).

11. But no one denies that Shearson solicited plaintiff (Answer, ¶2) and members of the class to buy Tidal; indeed the confirmation slip, annexed to the amended complaint, states on its face that Shearson solicited the order by which plaintiff Slade bought her shares in Tidal. And as the deposition of Slade makes evident, Shearson's solicitation wasn't casual, but persisted over a period of weeks. Therefore, we do not understand the significance of the fact that Shearson may not have included Tidal's stock on its "Master Buy List". As plaintiff testified, he never heard of Tidal,—a small over-the-counter company—until solicited by Shearson.

[Paragraph 12 is Omitted.]

Wherefore, it is respectfully submitted that plaintiffs' motion for a class action determination be granted and that defendant's motion for partial summary judgment and plaintiff Odette's motion for subclasses both be denied.

/s/ ABRAHAM L. POMERANTZ  
Abraham L. Pomerantz

[Sworn to June 12, 1973.]



**Memorandum Opinion of Carter, D. J., January 2, 1974**

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[SAME TITLE]

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**FACTUAL BACKGROUND:**

On November 10, 1972, Renee Slade ("Slade") instituted an action under the antifraud provisions of the Securities and Exchange Act of 1934 against Shearson, Hammill & Co., Inc. ("Shearson") complaining, in substance, that Shearson, an investment banker to Tidal Marine International Corp. ("Tidal Marine"), came into possession of material adverse information about Tidal Marine, and nevertheless promoted the sale of Tidal Marine stock to brokerage customers, including Slade and the class she seeks to represent. On November 20, 1972, Edward E. Odette ("Odette") brought a similar action against Shearson. On December 7, 1972, defendant moved to consolidate the two cases, which motion Slade's counsel supported and Odette's counsel opposed. On January 16, 1973, the motion was granted, and Slade's counsel were appointed general counsel, and "directed to submit a new motion to declare the propriety of the entire class represented by both actions."

On March 6, 1973, Karel Langer ("Langer"), represented by Odette's counsel, filed notice of motion to intervene as a plaintiff. On April 13, 1973, general counsel filed notice of motion for leave to proceed on behalf of all persons who purchased Tidal Marine stock during the period October 1, 1971 to August 2, 1972, as a result of solicitations by Shearson. On May 1, 1973, Langer and Odette filed a cross-motion for additional classes, and on May 24, 1973, defendant filed a cross-motion to strike the class action allegations from both complaints and to grant partial summary judgment.

*Memorandum Opinion of Carter, D. J., January 2, 1974*

## SUMMARY JUDGMENT:

Defendant, in support of its motion for partial summary judgment, relies on alternate theories: (a) that Shearson did not know and could not have known about Tidal Marine's cash shortage before May of 1972; and (b) that as a matter of law, even if Shearson's corporate finance department had known this non-public information, it was precluded from using it to prevent the solicitation of purchases by its retail sales force until the information was made public. Defendant's First Vice President, Sidney Bogardus, has described the events of late 1971 and early 1972 which plaintiffs allege constituted early notice of Tidal Marine's sinking fortunes, and which defendant points to as proof of its lack of notice until May, 1972: "In late 1971 and early 1972, several vessels of Tidal Marine's fleet were damaged. Shearson was advised by representatives of the company that the injuries amounted to an unusually large percentage of the fleet but that the damage and the revenue lost as a result of the damage were fully insured." One might reasonably infer from this statement that defendant was advised *in late 1971 and early 1972* of the magnitude of the injury to the fleet. However, defendant's counsel, in their reply memorandum, interpret it otherwise, and argue that Shearson logically could not have learned about the magnitude of the damage until May, 1972, "because at any given time, some elements of a fleet of nearly fifty ships will be undergoing repairs."

Since it is well settled that on a motion for summary judgment facts and inferences are to be viewed and drawn in the light most favorable to the party opposing the motion, *United States v. Diebold, Inc.*, 369 U.S. 654 (1962); *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), it must be concluded on the basis of the present record that defendant received notice prior to May, 1972. Hence, there is no factual predicate upon which a motion for summary judgment can be sustained.

*Memorandum Opinion of Carter, D. J., January 2, 1974*

Nor is such judgment warranted as a matter of law. It is, of course, true that an investment banker may not reveal inside information obtained pursuant to a confidential investment banking relationship, to its retail customers through its brokerage organization. However, defendant contends that an investment banker, once it receives adverse inside information, also may not *prevent* its brokerage organization from soliciting customers on the basis of public information which (because of its possession of inside information) it knows to be false or misleading. Defendant's reliance on *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, SEC Release No. 34-8459 (November 25, 1968), is misplaced, inasmuch as *Merrill Lynch* stands for no more than the proposition that a banker who receives inside information from an investment banking client cannot reveal same "to favored customers".

Reliance is also placed on a *complaint* filed by the SEC on June 4, 1973 in *SEC v. Bausch & Lomb, Inc., et al.*, 73 Civ. 2458 (S.D.N.Y.). Alleging a violation of § 10(b) of the Securities Exchange Act of 1934, the complaint states that an investment analyst in the employ of a defendant investment banking and brokerage house learned from the Chairman of the Board of Directors of Bausch & Lomb that the company anticipated a sharp reduction in earnings from previously announced estimates. Knowing that the information was non-public, the analyst transmitted it to the banking house's brokerage operation, which withdrew its outstanding "buy" recommendation for Bausch & Lomb. This allegation indicates, argues Shearson, that the SEC regards as unlawful the withdrawal, by a possessor of material adverse inside information, of an outstanding brokerage recommendation. However, the SEC's action also alleges that the brokerage house actually communicated the inside information to its customers, some of whom consequently sold their Bausch & Lomb stock. It is this

*Memorandum Opinion of Carter, D. J., January 2, 1974*

disclosure to customers which appears to be the gravamen of that part of the complaint.

Although the non-disclosure in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), did not involve the same combination of investment banking and brokerage functions as is present here, the direction given by the Second Circuit Court of Appeals is broad enough to cover the instant case:

"Thus, anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in *or recommending* the securities concerned while such inside information remains undisclosed." *Id.* at 848 (emphasis added).

Defendant Shearson is no doubt troubled by the realization that among the consequences of applying the rule enunciated in *Texas Gulf Sulphur* to transactions such as the one here at issue is that an investment banker/broker-dealer who possesses adverse inside information about a security in which it is dealing is disadvantaged vis-a-vis other broker-dealers who do not possess such information, and hence are not disabled from soliciting purchasers. It must be remembered, however, that Shearson voluntarily entered into a fiduciary relationship with Tidal Marine, as a consequence of which it received confidential information. Shearson also voluntarily entered into fiduciary relationships with its customers. It cannot recognize its duty to the former while ignoring its obligation to the latter. Having assumed fiduciary responsibilities, Shearson is required to incur whatever commercial disadvantage fulfillment of those obligations entails.

The motion for partial summary judgment must, therefore, be denied.



*Memorandum Opinion of Carter, D. J., January 2, 1974*

CLASS ACTION:

General counsel for plaintiffs seek leave, pursuant to Rule 23 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and Rule 11A of the Local Rules of this court, to proceed on behalf of all persons who purchased the stock of Tidal Marine during the period October 1, 1971 to August 2, 1972, as a result of solicitations by defendant Shearson. Counsel represent that the class in all likelihood includes several hundred members; that the case involves one narrow question, common to all plaintiffs, *viz.*, whether Shearson owed a duty to each member of the class not to solicit purchases of stock in a company that it knew (actually or constructively) to be in a precarious financial condition; that plaintiffs' claims are typical of the claims of the class; and that plaintiffs will vigorously litigate this action, and will therefore adequately represent the class.

It is apparent that there are common questions of law and fact and that the size of the class warrants a finding that joinder is impractical. Moreover, the court has no reason to doubt that plaintiffs' general counsel can and will provide fair and adequate representation to the other members of the class. Fed. R. Civ. P. Rule 23(a)(1), (2), and (4). Defendant does not challenge directly plaintiffs' assertion of typicality. Fed. R. Civ. P. Rule 23(a)(3). Shearson does, however, seriously dispute whether "questions of law or fact common to the members of the class predominate over any questions affecting individual members and . . . [whether] a class action is superior to other available methods for the fair and efficient adjudication of the controversy," Fed. R. Civ. P. Rule 23(b)(3).

Defendant contends that in securities fraud cases involving oral representations, common questions do not predominate because significant differences may exist among the separate conversations. Plaintiffs point out that the *amended* complaint is not based on oral representations or misrepresentations, but rather rests upon a failure to

*Memorandum Opinion of Carter, D. J., January 2, 1974*

disclose material facts. The fact that certain individual class members may also have been victims of fraudulent misrepresentations, it is argued, is immaterial, and does not militate against class action treatment. Plaintiffs rely principally on *Esplin v. Hirschi*, 402 f.2d 94, 99-100 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969), in which the court declared:

"It is no doubt true that in determining the predominance of common over individual questions, the critical test is 'whether there is "material variation" in elements like the representations made by the defendants to different members of a plaintiff class or the degrees of reliance by members of the class.' Accordingly, defendants stress the fact that there were oral misrepresentations that varied with respect to each of the purchasers. . . . As to the 10b-5 action, the statement is relevant but not controlling. This is because the plaintiffs were not relying merely upon oral misrepresentations whose content would vary as to the class members, but rather, as later established at the trial, the investors did not rely upon oral misrepresentations at all, or for that matter upon any affirmative misrepresentations, but upon a complete failure to disclose material facts—which default was necessarily common to all shareholders."

Defendant takes the position that the *Esplin* formulation was "apparently rejected" by this court in *Morris v. Burchard*, 51 F.R.D. 530 (S.D.N.Y. 1971). I disagree. The complaint in *Morris* was not bottomed on a failure to state material facts, except to the extent that every misrepresentation necessarily entails an omission to state facts necessary to prevent the representation from being misleading. Rather, the *Morris* case involved

"a disconnected series of oral statements, which must have varied from person to person and seemingly

*Memorandum Opinion of Carter, D. J., January 2, 1974*

[were] not made pursuant to a common course of conduct. No one of the variety of misstatements was necessarily brought to the attention of each individual purchaser. . . . The most that can be distilled from the elusive form of the allegations of the complaint is that the purchaser relied merely upon *oral* statements whose content, extent and shades of meanings would as a practical probability vary in respect of each of the class members and with each of the defendants." *Id.*, at 534.

Defendant's reliance on *Moscarelli v. Stamm*, 288 F. Supp. 453 (E.D.N.Y. 1968) (defendant fraudulently represented orally that he would not sell plaintiffs' securities even though they failed to supply collateral) is similarly misplaced.

Defendant asserts that "[u]sing the niceties of pleading and amendment, general counsel now attempt to convert this plain case of alleged misrepresentation into one of omission." Plaintiffs possess the right, at this stage at least, to structure their lawsuit within wide permissible limits. Besides, even if plaintiffs' "conversion" somehow proves to be less than complete, Rule 23 provides the flexibility to permit this class action to proceed at this preliminary stage. See *Kronenberg v. Hotel Governor Clinton, Inc.*, 41 F.R.D. 42, 45 (S.D.N.Y. 1966). I find that common questions of law and fact predominate, and that plaintiffs are typical class members. Accordingly, plaintiffs' motion, to proceed on behalf of all persons who purchased the stock of Tidal Marine in the period October 1, 1971, to August 2, 1972, as a result of solicitations by defendant Shearson, is granted, and defendant's motion to strike is denied.

[The last portion of this opinion pertains to an issue not raised on this appeal and is omitted.]

**Memorandum Opinion of Carter, D. J., March 18, 1974**

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**[SAME TITLE]**

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On January 2, 1974, this court entered an order in the form of a memorandum opinion in which, *inter alia*, the motion of defendant Shearson, Hammill & Co. ("Shearson") for partial summary judgment was denied. Defendant Shearson now seeks to have the question of law raised in that motion certified for appeal to the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1292(b),<sup>1</sup> and urges that the statutory criteria for certification have been met, to wit: a "controlling question of law" has been presented; a "substantial ground for difference of opinion" exists in respect of that question; an immediate resolution of that issue would "materially advance the ultimate termination of the litigation."

The question Shearson seeks to have certified is: Is an investment banker/securities broker who receives adverse material non-public information about an investment banking client precluded from soliciting customers for that client's securities on the basis of public information which (because of its possession of inside information) it knows

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<sup>1</sup> 28 U.S.C. § 1292(b) provides, in pertinent part:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . ."



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to be false or misleading? In disposing of the summary judgment motion, this court answered in the affirmative. A contrary holding would have sustained defendant's contention that an organization which discovers adverse material non-public information in its investment banking capacity may, indeed must, continue to solicit customers as if the adverse information did not exist. Such a holding would effectively absolve defendant of the liability charged in plaintiff Slade's amended complaint and in Count One of plaintiff Odette's amended complaint.<sup>2</sup> It is apparent therefore that the issue defendant seeks to have certified would, if overturned on appeal, have a nearly dispositive impact on the Slade action, *see Sobel v. Hertz, Warner & Co.*, 338 F. Supp. 287, 300 (S.D.N.Y. 1971), and a similar impact on that part of the Odette action in respect of which class action status has been granted. Thus the question presents a "controlling issue of law" within the meaning of § 1292(b).

Likewise easily satisfied is the third criterion for certification. Where, as here, a contrary decision on appeal would substantially affect "the scope of discovery procedure, the length and complexity of ultimate trial and the expenditure of time, money and effort . . .," *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962), a resolution of the question will materially advance the ultimate termination of the litigation. Although counts two through four of the Odette amended complaint would survive a reversal, the remaining action would not necessitate inquiry either during discovery or at trial

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<sup>2</sup> Plaintiffs claim that defendant solicited purchases from them and the class they represent at a time when it knew or should have known of the unsound financial condition of Tidal Marine International Corporation ("Tidal"). If defendant neither had an obligation to disclose information concerning Tidal's finances, nor to refrain from touting its stock, then plaintiff's cause of action would appear to be critically if not fatally flawed.

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into Tidal's financial condition, or into defendant Shearson's knowledge or constructive knowledge thereof. Moreover, it may be that the remaining Odette claims would not be maintainable as class actions, thus further reducing the scope and complexity of the action. Even if plaintiff Odette were to seek successfully to proceed on behalf of one or more remaining classes,<sup>3</sup> those classes would likely contain substantially fewer members than the broader class encompassed by the Slade amended complaint. Thus, the scope of a post-reversal proceeding would be substantially reduced quantitatively as well as qualitatively. Furthermore, defendant represents that a "reduced" lawsuit might result in the discontinuance of what promises to be a complicated third-party claim.

Turning to the third certification criterion, whether a "substantial ground for difference of opinion" exists, it must be noted at the outset that the question in respect of which certification is sought is apparently one of first impression. Neither the case on which this court principally relied in disposing of the summary judgment motion, *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2nd Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971), *reh. denied*, 404 U.S. 1064 (1972), nor any other case cited by plaintiffs involved the same combination of investment banking and brokerage functions as does the case at bar. Nor does any case cited by the parties concern a broker who advised its customers to take action *inconsistent* with the inside information it possessed. In short, neither the parties nor the court in its independent canvass of the authorities has uncovered a case

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<sup>3</sup> Contrary to assertions made by Shearson in support of the instant motions, this court's January 2, 1974 Opinion as it relates to class action status does not foreclose class treatment of Odette's additional claims, but merely rejects Odette's contention that antagonism exists between the class defined in the Slade amended complaint and certain proposed subclasses.

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precisely on point. Thus, the January 2nd opinion constituted an application of the principle enunciated in *Texas Gulf Sulphur* to a situation which another court might find to be so different as to render the principle inapposite.

The instant case has far-reaching ramifications for the structure of the securities industry, see *Bernstein, Securities Class Actions*, NEW YORK LAW JOURNAL, January 28, 1974 (pp. 1, 4), apparently not foreseen by *Texas Gulf Sulphur* and its progeny. To require organizations like defendant's to refrain from effecting transactions in securities of companies about which they have learned adverse inside information may be to render it exceedingly difficult for any such organization to function as an investment banker for a company and at the same time function as a broker-dealer in that company's securities. On the other hand, so long as such organizations continue to exercise a dual function, they incur dual (sometimes conflicting) fiduciary obligations which neither they nor this court can properly ignore.

The bare fact that the issue to be certified is of considerable importance to the securities industry does not justify certification. *Bobolakis v. Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 239-40 (S.D.N.Y. 1958). However, where as here, it is clear that an immediate appeal may save the parties "the cost and delay of protracted and expensive litigation," *id.* at 240, where the law is unsettled, and where the court's ruling may have widespread ramifications for the securities industry, "it may be in the interest of justice to present the Court of Appeals with an opportunity to consider and answer the [question] raised at the moment in the litigation [it] may be most clearly framed." *Sobel v. Hertz, Warner & Co., supra*, at 300.

In sum, the question defendant seeks to have certified is "a controlling question of law as to which there is substan-

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tial ground for difference of opinion," and "an immediate appeal . . . may materially advance the ultimate termination of the litigation."

Accordingly, the motion is granted.

So ORDERED.

/s/ ROBERT L. CARTER  
Robert L. Carter  
U.S.D.J.

Dated: New York, New York  
March 18, 1974



**The Following Materials Are Included at the Request  
of Counsel for Odette.**

**Amended Complaint in Odette v. Shearson,  
Hammill & Co. Inc.**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

EDWARD D. ODETTE, individually  
and as representative of a class,  
*Plaintiff,*  
v.  
SHEARSON, HAMMILL & CO.,  
INCORPORATED,  
*Defendant.*

72 Civ. 4930

AMENDED  
COMPLAINT

CLASS ACTION

PLAINTIFFS DEMAND  
A TRIAL BY JURY

Plaintiff by his attorney, R. Alan Stotsenburg, alleges  
upon information and belief:

**JURISDICTION AND VENUE**

1. This court has jurisdiction of this action under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (Exchange Act).
2. The defendant Shearson, Hammill & Co., Incorporated (Shearson) used instrumentalities of interstate commerce, including the mails, as well as the facilities of the national over-the-counter securities market to carry out the acts, transactions and devices which are the basis of this complaint.
3. Numerous acts and transactions constituting violations which are the basis of this complaint occurred in the Southern District of New York.
4. Plaintiff brings this action individually and as representative of a class.

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PARTIES

5. Plaintiff Edward E. Odette resides at 501 East 79th Street, New York, New York 10021. Mr. Odette is an official court reporter in the United States District Court.

6. Defendant Shearson is a Delaware corporation with its principal office at 14 Wall Street, New York, New York 10005, in the Southern District of New York, and 56 branch offices (51 in the United States; 5 abroad). Shearson is one of the world's largest securities brokerage firms.

7. At all relevant times, defendant Shearson was engaged in two different businesses:

a. *broker*, that is, the business of effecting transactions in securities for the account of others.

b. *dealer*, that is, the business of buying and selling securities for its own account.

8. At all relevant times, defendant Shearson was registered pursuant to Exchange Act Section 15(b) as a broker and as a dealer, and as such was subject to the obligations imposed on a registered broker-dealer in transactions with or for the account of its customers.

9. At all relevant times, defendant Shearson was a member of the New York Stock Exchange and the National Association of Securities Dealers, Inc.

10. The allegations in this complaint of acts, misrepresentations, nondisclosures, schemes, practices or a course of business of defendant Shearson mean that such activities were done by one or more of the defendant corporation's directors, officers, employees or agents (or by others under its control or in common control with it) and that

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such activities are attributable to the defendant corporation based on:

- a. the agency principle of respondent superior;
- b. principles of corporate liability;
- c. the express civil liability of a controlling person under Exchange Act section 20;
- d. the implied civil liability under the Exchange Act of persons who aid or abet another in the violation of its antifraud provisions while knowingly (or with reason to know) benefiting from the fraud being committed;
- e. the implied civil liability under the Exchange Act of a registered broker-dealer for violation of self-regulatory rules intended for the protection of investors of a national securities exchange (New York Stock Exchange Rules) (NYSE Rules) or a national securities association (National Association of Securities Dealers, Inc. Rules of Fair Practice) (NASD Rules).

CLASS ACTION ALLEGATIONS

11. Plaintiff requests this court to enter an order permitting this action to be maintained as a class action pursuant to Rule 23, Fed. R Civ. P., based on appropriate findings under parts (1)(A), (2) and (3) of subdivision (b) of Rule 23.

12. *Description of class.* The class which plaintiff seeks to represent is composed of all customers of Shearson who purchased shares of Tidal Marine International Corp. (TMI) common stock during the period commencing July 20, 1971 and ending August 21, 1972. A person should

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not be excluded from the class if he did not become a holder of record (for example, if Shearson retained custody of the securities) or if he later sold his shares. It does not matter whether Shearson acted as principal or agent in the transaction. Sub-classes will probably be necessary; reliance may be a requisite element of certain sub-classes.

13. The prerequisites to a class action set forth in subdivision (a) of Rule 23 are met as follows:

a. The class which plaintiff seeks to represent is so numerous that joinder of all members is impracticable. There are more than 1,000 Shearson customers in the proposed class.

b. There are questions of law or fact common to the class which plaintiffs seek to represent as follows:

(1) whether Shearson, in issuing its recommendations to purchase and hold TMI, had a reasonable basis in fact;

(2) whether Shearson failed to disclose that it was making a market in TMI and, if so, whether it had a duty to do so;

(3) whether Shearson failed to disclose that the market price of TMI was artificially above the true market price as a result of the dominant position of Shearson as a market maker and as a result of Shearson's manipulations in the market and, if so, whether it had a duty to do so;

(4) whether Shearson failed to disclose that it was acting as agent for both buyer and seller and, if so, whether it had a duty to do so;

(5) whether Shearson at any time knew or should have known of material adverse information about



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TMI, the issuer, which was undisclosed or not fully disseminated to the investing public and which it did not disclose to the investing public (including the class) and, if so, whether it had a duty to do so;

(6) whether Shearson failed to disclose that it had a conflict of interest as a result of an investment banking relationship with TMI which imposed a duty to keep secret any material inside information which it learned from TMI and prevented Shearson from giving further investment advice about TMI—buy, sell or hold—to the very customers it solicited to purchase TMI and, if so, whether it had a duty to do so.

This listing does not exhaust the questions of law or fact which are common to the class.

c. The claims or defenses of plaintiff are typical of the claims or defenses of the class which he seeks to represent. Plaintiff does not have any special relationship with the issuer or any of its present or former management.

d. Plaintiff will fairly and adequately protect the interests of the plaintiff class. Plaintiff's claims are typical and representative of the claims of the class. Plaintiff purchased shares of TMI during the time period described for the class. There do not now appear to be any defenses of a unique variety which may be asserted against plaintiff. Plaintiff does not have any interest which is antagonistic to the plaintiff class.

14. This court should permit this action to be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P., based on an appropriate finding under subdivision (b)

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(1)(A) that prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. It is essential to a fair administration of the federal securities laws that the duties of defendant Shearson, its agents and employees, be determined uniformly throughout the country with respect to the fact situation set forth in this complaint.

15. This court should permit this action to be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P., based on an appropriate finding under subdivision (b) (2) that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Defendant Shearson still refuses to respond to members of the class who ask investment advice about the TMI shares they purchased; it neither informs them of the true financial condition of TMI or advises them that it cannot give them such advice. This is a flagrant and continuing violation of the key antifraud provision of the Exchange Act, section 10(b), and clause 3 of rule 10b-5, since Shearson is engaging in an act, practice or course of business which operates as a fraud or deceit upon its customers (who will suffer irreparable harm when trading resumes).

16. This court should permit this action to be maintained as a class action pursuant to Rule 23, Fed. R. Civ. P., based on an appropriate finding under subdivision (b)(3) that the questions of law and fact predominate over any questions affecting only individual members and a class action is superior to other available methods for

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efficient adjudication of the causes of action for the following reasons:

a. The members of the class do not appear to have any interest in individually controlling the prosecution or defense of separate actions.

b. The extent and nature of related litigation are: There is no other lawsuit pending relating to this matter.

c. It is desirable that these claims be litigated in the Southern District of New York since the defendant's principal place of business is in this district, including its research and underwriting departments which are the subject of this class action.

d. The difficulties of management of a class action have been minimized by the fact that the suit is brought in the judicial district where (1) the plaintiff resides, (2) the defendant's principal place of business is located, including its marketing, research and underwriting departments and its records, and (3) the wrong occurred. Counsel for plaintiff has been retained on a contingent basis provided that the action is allowed to proceed as a class action, that is, plaintiff's counsel will not be expected to proceed without a retainer if plaintiff's request for class action status is denied, thus sounding the "death knell" for the action since plaintiff's losses are less than \$10,000 in value. Equally important, plaintiff has limited funds to meet the costs of this case whereas defendant Shearson has breathtakingly larger capabilities to carry on and fight this action by attrition, motion for transfer, and every other procedural device. The method of notifying members of the class, for example, if too expensive, or a requirement of a bond, could simply put plaintiff out of busi-

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ness—thus depriving the members of the class of their day in court for transactions by defendant Shearson as both investment banker and recommending broker-market maker in a stock which the Securities and Exchange Commission (SEC) has suspended from trading. Delay with respect to the requested injunctive relief will work to the injury of the class who remain in the dark about what to do with their TMI shares.

COUNT 1: THE MARKETING EFFORT

17. During a period beginning about July 20, 1971 and ending about August 21, 1972 (the Marketing Period), defendant Shearson knowingly and wilfully engaged in a common course of conduct in its 56 branch offices located throughout the United States and abroad to induce its customers to purchase TMI shares and hold them for investment. The common course of conduct existed because Shearson either—

a. embarked upon and pursued a concerted marketing effort; or

b. aided and abetted (rather than properly supervising) its salesmen in a campaign which it knew (or should have known) they began by rumor and word of mouth to tout TMI using (1) written sales materials and communications issued by Shearson's research and underwriting departments, (2) the apparatus of a nationwide securities brokerage house (Shearson), and (3) the good name and reputation of Shearson.

18. During the Marketing Period, the Shearson research and underwriting departments issued written recommendations to purchase and hold TMI shares for investment, or otherwise describing TMI in optimistic terms (the Recommendations).



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19. The Recommendations were issued in a manner designed to aid salesmen in the sale of TMI shares to customers.

20. The initial Recommendation was made when Shearson permitted its research analyst on the shipping industry, James J. Dowling, to be quoted in the July 20, 1971 issue of the Wall Street Journal recommending the purchase of TMI shares. Shearson maintained continuous Recommendations to purchase and hold TMI shares from July 20, 1971 until August 21, 1972 when it withdrew all Recommendations and substituted a blanket of silence, that is, a policy of refusing to speak or reply about TMI. Shearson has refused to give any advice or comment whatsoever about TMI since then.

21. During the Marketing Period, defendant Shearson sent teletype "wire flashes" to all its branches touting TMI.

22. In publishing its Recommendations and wire flashes about TMI, for use by its salesmen during the Marketing Period, defendant Shearson intended (or knew or should have known) that its customers would—

a. place their trust and confidence in Shearson as a major national registered broker-dealer.

b. rely on Shearson expertise in research and specifically on the Recommendations and wire flashes and purchase TMI shares and further rely on such Recommendations and wire flashes in holding such shares for long-term investment rather than selling them.

c. assume that the Recommendations and wire flashes were based on actual knowledge and careful

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consideration of all the material facts relating to TMI and further assume that such facts had been obtained by the Shearson research department through a reasonable and adequate investigation of TMI.

d. assume that Shearson would disclose to all customers considering the purchase of TMI (1) any material adverse facts of which it was or should have been aware, including the fact that essential information had not been obtained or was unavailable (and the risks flowing from such a lack of information); and (2) any conflicts of interest on the part of Shearson in making the Recommendations, wire flashes or otherwise executing purchase orders for TMI.

e. assume that Shearson would follow the progress of TMI with the particular scrutiny required where a broker-dealer has advised its customers to purchase a security and would immediately communicate to such customers and make public any material adverse facts which it learned or which were reasonably ascertainable.

f. assume that Shearson would undertake a continuing obligation to those customers who were induced to purchase TMI shares in reliance on the Recommendations, wire flashes and other Shearson inducements to advise such customers of any conflict of interest on the part of Shearson which developed.

23. Plaintiff is a customer of Shearson who purchased TMI shares from Shearson as principal during the Marketing Period, as follows:

<u>Number shares bought</u>	<u>Date</u>	<u>Price per share</u>	<u>Total price</u>
200	Feb. 11, 1972	\$21.25	\$4,250.00

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24. The plaintiff class, as customers of Shearson, purchased TMI shares from Shearson as principal or through Shearson as agent during the Marketing Period.

25. In connection with the purchase or sale of TMI shares by plaintiff and the plaintiff class during the Marketing Period from or through defendant Shearson, plaintiff and the plaintiff class were induced by and relied upon the Recommendations, wire flashes and other Shearson inducements in the manner intended by defendant Shearson as stated in paragraph 22, that is, the purchases and holding of TMI shares were actually induced by the Recommendations, wire flashes and other Shearson inducements.

26. Defendant Shearson knew or should have known in marketing TMI shares to its customers during the Marketing Period, in allowing its salesmen to solicit TMI purchase, in publishing the Recommendations and wire flashes about TMI, and in causing or permitting the creation, existence or use of other sales inducements that—

a. there was no reasonable basis in fact to advise the purchase of TMI shares.

b. a reasonable and adequate investigation of TMI had not been made.

c. the Recommendations and wire flashes were not based on actual knowledge and careful consideration of all the material facts relating to TMI.

d. essential and material information about TMI had not been obtained, was unavailable, or was not being furnished to Shearson customers.

26. After August 2, 1972, various sophisticated investors in the Wall Street community became aware that

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TMI had a cash squeeze and the market price of the shares dropped markedly. It was last quoted on November 10, 1972 at 2 bid, 2 $\frac{1}{8}$  asked.

27. Plaintiff and the plaintiff class cannot sell their TMI shares at this time since the SEC suspended trading in TMI shares at 9:45 a.m. on November 13, 1972 for a 10-day period citing a lack of up-to-date information about the company's financial condition (the most recent audited financials are for calendar 1970). The suspension was renewed on November 23 for a second 10-day period; and on December 2, it was renewed for a third 10-day period. The suspension may or may not be renewed beyond its present expiration date, December 12, 1972. Plaintiff believes that when trading resumes the market will reflect the investment meaning of recent developments within a short time.

28. Defendant Shearson violated Exchange Act sections 10(b) and 15(c)(1), (2) and (3) and the rules thereunder, particularly rules 10b-5 and 15c1-2 in that its acts constituted manipulative, deceptive or fraudulent devices in connection with the purchase or sale of a security or to induce such purchase or sale, and also involved untrue statements of material facts and omissions of material facts, and particularly constituted a device, scheme or artifice to defraud plaintiff and the plaintiff class and a course of business which operated as a fraud or deceit upon them.

COUNT 2: CONFLICT OF INTEREST WITH REGARD TO  
UNDISCLOSED MATERIAL ADVERSE INFORMATION

29. Paragraphs 16 to 28 are incorporated by reference.

30. During the Marketing Period (specifically, in mid-1971), defendant Shearson entered into an investment bank-



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ing relationship with TMI in connection with the proposed sale of TMI securities by public offering or by private placement. In this relationship, it acted as financial advisor to TMI with respect to an \$8 million five year loan made to TMI by a group of banks on December 31, 1971. It continued to act as TMI's investment banker for an anticipated public offering at least until August 1972. As TMI's investment banker, defendant Shearson received material information about TMI which had not been disclosed to the investing public and which Shearson had a duty not to disclose. This duty conflicted with Shearson's duty to its customers.

31. Defendant Shearson did not disclose to those of its customers who had been induced to purchase TMI shares or those who thereafter made new purchases of TMI shares on the basis of its Recommendation the existence of the investment banking relationship between TMI and Shearson or the implications of the relationship with respect to Shearson's ability to give further investment advice about TMI shares to such customers, that is, the conflicting duty to not disclose material information obtained from TMI to anyone—not even its own customers.

32. Acceptance by defendant Shearson of an investment banking relationship with TMI at the same time it was recommending the purchase of TMI shares to its customers or, conversely, recommendation by defendant Shearson of the purchase of TMI shares and acceptance of purchase orders from its customers at the same time it was acting as investment banker to TMI, was a *per se* violation of Exchange Act sections 10(b) and 15(c)(1) and rules 10b-5(1) & (3) and 15c1-2(a) & (c).

33. During the Marketing Period, defendant Shearson (either as a result of its investment banking relationship

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with TMI or otherwise) received actual notice (or in the exercise of due diligence should have known) of material adverse facts about TMI which had not been disclosed or fully disseminated to the investing public (including those of its customers who it had induced to purchase TMI shares and those who made new purchases of TMI shares on the basis of its Recommendations), that is, that TMI was in dire financial straits, and other material adverse information.

34. Defendant did not disclose the material adverse information to the investing public (including those of its customers who it had induced to purchase TMI shares and those who made new purchases of TMI shares on the basis of its Recommendations); instead, defendant Shearson went right on with its Marketing Period activities, pushing sales of TMI shares without disclosing the material adverse facts to anyone.

35. Defendant Shearson had learned from TMI (through its underwriting department or otherwise) that its predictions, Recommendations and previous wire flashes were no longer true, but rather misleading, with respect to TMI, omitting to state material facts necessary to make the statements made not misleading. Defendant Shearson, however, did nothing to correct the false and misleading communications being used or made by its salesmen to sell TMI shares, but permitted them to continue to make and use them.

36. The silence of defendant Shearson when it was in possession of material adverse facts about TMI, and the failure to make any disclosure whatsoever to the plaintiff class of Shearson customers who purchased and held TMI shares, constituted a device, scheme or artifice to defraud

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plaintiffs and the plaintiff class and the engaging in an act, practice or course of business which operated as a fraud or deceit upon them in violation of Exchange Act sections 10(b) and 15(c)(1) and rules 10b-5 and 15c1-2.

COUNT 3: MARKET MAKER AND DEALER STATUS

37. Paragraphs 16 to 36 are incorporated by reference.

38. During the period beginning no later than October 12, 1971 and ending no earlier than May 11, 1972, defendant Shearson made a market in TMI shares.

39. Defendant Shearson's objective in its TMI market making activities was to capitalize on the increased market activity of its customers which it knew would result from its Recommendations (described in Count 1) and its investment banking role (described in Count 2). In effect, Shearson was engaging in churning its customers accounts on a mass basis without regard to the suitability of TMI shares for the particular customer and in violation of the "know your customer" rule, NYSE Rule 405.

40. In these transactions, defendant either acted as a dealer for its own account and made an exorbitant profit in the form of a mark-up or it acted as agent (usually for both buyer and seller) and made excess commissions.

41. Plaintiff and the plaintiff class were not advised by defendant Shearson at the time their purchase orders were solicited or at any other time before the completion of the transaction, in writing or otherwise, of the facts stated in paragraphs 37 to 41 which constituted devices, schemes or artifices to defraud and the engaging in acts, practices or a course of business which operated as a fraud

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or deceit upon plaintiff and the plaintiff class in violation of Exchange Act sections 10(b), 11(d)(2) and 15(c)(1) and rules 10b-5, 15-c1-2 and 15c1-4.

COUNT 4: CONTINUING VIOLATIONS AND THE  
NEED FOR INJUNCTIVE RELIEF

42. Paragraphs 16 to 41 are incorporated by reference.

43. Defendant Shearson has refused and continues to refuse to disclose to plaintiff and the plaintiff class either (1) the adverse material information about TMI which it has in its possession and which is undisclosed to the investing public or (2) its inability to disclose such material information or otherwise advise plaintiff and the plaintiff class whether to hold or sell their TMI shares.

44. When the SEC trading suspension ends on December 12, 1972 or such later date to which the suspension may be extended, the plaintiff and the plaintiff class will not have any investment advice from defendant Shearson as to what they should do with the TMI shares they purchased on Shearson's recommendation. In the alternative, plaintiff and the plaintiff class will not have a clear statement from defendant Shearson that it cannot give its own customers such investment advice and the reason for such inability.

45. Plaintiff and the plaintiff class are likely to suffer irreparable harm because of this silence on the part of defendant Shearson in the face of their constant requests for advice about TMI shares purchased as Shearson customers. If action—such as sale of the TMI shares is appropriate—members of the investing public who are not Shearson customers will have the advantage of getting such advice.



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They will get a better price for their shares than Shearson customers who may not realize that they ought to sell and will sit on their shares—in reliance on Shearson's acceptance of its affirmative obligation to advise them—as those TMI shares dwindle in value to zero.

RELIEF REQUESTED

46. Plaintiff and the plaintiff class suffered losses due to the drop in market value of the TMI shares they purchased and held.

47. The losses of plaintiff and the plaintiff class were caused directly by the acts and omissions of defendant Shearson as set forth in counts 1, 2 and 3 or by all three counts jointly.

48. Plaintiff asks this court to order rescission of the contracts to purchase TMI shares made by plaintiff and the plaintiff class with defendant Shearson during the Marketing Period, plus interest and costs, for the reason that such contracts are void within the meaning of Exchange Act section 29(b).

49. In the alternative, plaintiff asks this court to award damages to plaintiff and the plaintiff class of \$9,000,000, plus interest and costs.

50. Plaintiff asks this court to order an accounting of the profits made unlawfully and fraudulently by defendant Shearson through its market making activity during the Marketing Period (as set forth in Count 3) since it is unjust to allow a wrongdoer to profit from its wrongs. Plaintiff asks that any profit be paid over to the plaintiff class.

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51. Plaintiff asks this court to enter an order of preliminary and permanent injunction against defendant Shearson pursuant to Rule 65, Fed.R.Civ.P., requiring that defendant either (1) disclose all material information in its possession about TMI or (2) clearly state its inability to disclose such information and the reasons, to all members of the plaintiff class. Plaintiff asks that the injunction prohibit defendant Shearson from a further such violation of the federal securities laws.

52. Plaintiff asks this court to award a reasonable attorney's fee either from defendant or assessed against any fund which may be recovered from or created by defendant Shearson pursuant to an order of this court in this action.

/s/ R. ALAN STOTSENBURG

260 Riverside Drive  
New York, N. Y. 10025  
212/749-3388

*Attorney for Plaintiff*

**Shearson's Answer To Amended Complaint in  
Odette v. Shearson, Hammill & Co. Inc.**

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[SAME TITLE]

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Defendant Shearson, Hammill & Co. Incorporated ("Shearson"), by its attorneys Dewey, Ballantine, Bushby, Palmer & Wood, answers the amended complaint in this action as follows:

1. Paragraph 1 of the complaint states a conclusion of law, to which no responsive pleading is required.
2. Denies each and every allegation contained in paragraphs 2 and 3 of the complaint.
3. Paragraph 4 of the complaint states a conclusion of law, to which no responsive pleading is required.
4. On information and belief, admits the truth of the allegations contained in paragraph 5 of the complaint.
5. Denies each and every allegation contained in paragraph 6 of the complaint, except admits that Shearson is incorporated under the laws of the State of Delaware and maintains its principal office at 14 Wall Street, New York, New York, as well as branch offices in the United States and abroad.
6. Denies each and every allegation contained in paragraph 7 of the complaint, and further avers that Shearson is a registered broker-dealer in securities.
7. Denies each and every allegation contained in paragraph 10 of the complaint.

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8. Paragraphs 11 through 16 of the complaint state conclusions of law, to which no responsive pleading is required except denies that this is a proper class action.

9. Denies each and every allegation contained in paragraphs 17 through 22 of the complaint.

10. Denies each and every allegation contained in paragraph 24 of the complaint, except admits that Shearson sold shares of common stock of Tidal Marine International Corp. ("Tidal Marine") to, or purchased such shares for, certain of its customers during portions of the period from July 20, 1971 through August 21, 1972.

11. Denies each and every allegation contained in paragraphs 25 and 26 of the complaint.

12. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint except admits, on information and belief, that Tidal Marine common stock was last traded in the general area of \$2 per share and that trading in Tidal Marine common stock was suspended on November 13, 1972.

13. Denies each and every allegation contained in paragraph 28 of the complaint.

14. Repeats and realleges its answers to the paragraphs incorporated by reference in paragraph 29 of the complaint with the same force and effect as if those answers were here set forth in full.

15. Denies each and every allegation contained in paragraph 30 of the complaint, except admits that, in 1971, Shearson entered into an investment banking relationship



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with Tidal Marine and acted as its financial adviser with respect to an \$8 million, five-year term borrowing which closed on December 31, 1971; and admits that Shearson received non-public information relating to Tidal Marine.

16. Denies each and every allegation contained in paragraphs 31 and 32 of the complaint.

17. Denies each and every allegation contained in paragraph 33 of the complaint, except admits that Shearson had non-public information relating to Tidal Marine.

18. Denies each and every allegation contained in paragraph 34 of the complaint, except admits that Shearson did not disclose non-public information relating to Tidal Marine to its customers or to the public.

19. Denies each and every allegation contained in paragraphs 35 and 36 of the complaint.

20. Repeats and realleges its answers to the paragraphs incorporated by reference in paragraph 37 of the complaint with the same force and effect as if those answers were here set forth in full.

21. Denies each and every allegation contained in paragraph 38 of the complaint, except admits that, for a period of time in 1971 and 1972, Shearson made a market in the common stock of Tidal Marine International Corp.

22. Denies each and every allegation contained in paragraphs 39 through 41 of the complaint.

23. Repeats and realleges its answers to the paragraphs incorporated by reference in paragraph 42 of the complaint

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with the same force and effect as if those answers were here set forth in full.

24. Denies each and every allegation contained in paragraph 43 of the complaint, except admits that Shearson has refused to disclose to plaintiff information concerning Tidal Marine which is not available to the investigating public.

25. Denies each and every allegation contained in paragraphs 44 and 45 of the complaint.

26. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46 of the complaint, except denies the existence of any plaintiff class.

27. Denies each and every allegation contained in paragraph 47 of the complaint.

WHEREFORE defendant Shearson, Hammill & Co. Incorporated demands judgment dismissing this action, together with costs and disbursements, and any additional relief which the Court deems to be fitting and proper under the circumstances.

Dated: New York, New York  
December 18, 1972

DEWEY, BALLANTINE, BUSHBY,  
PALMER & WOOD

By /s/ RUSSEL H. BEATIE, JR.  
(A Member of the Firm)  
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